Supreme Court
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No.

In the Supreme Court of the United States

ALPHONSO STRIPLING,

Petitioner,

v.

FREDRICK HEAD, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Due Process Clause, a defendant seeking to avoid execution pursuant to *Atkins* v. *Virginia*, 536 U.S. 304 (2002), may be required to prove his or her mental retardation beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alphonso Stripling, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia in Mr. Stripling's habeas corpus proceeding, as modified upon denial of the parties' motions for reconsideration (App., *infra*, 1a-18a), is reported at 588 S.E.2d 226. The opinion of the Superior Court of Georgia, Butts County (App., *infra*, 21a-105a), was not reported.

JURISDICTION

The Supreme Court of Georgia entered judgment in this matter on October 14, 2003; timely motions for reconsideration were denied on November 26, 2003. App., *infra*, 19a. On February 11, 2004, the Honorable Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, issued an order granting a 40-day extension, to and including April 5, 2004, for filing a petition for writ of certiorari. App., *infra*, 150a-151a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

The decision of the Supreme Court of Georgia in this matter is the final judgment in Mr. Stripling's state habeas corpus proceeding. The fact that in that decision the court vacated Mr. Stripling's prior death sentence and ordered the State to conduct additional *criminal* proceedings — to determine whether Mr. Stripling is mentally retarded and to redetermine the appropriate sentence to impose on him whether or not he is found to be mentally retarded — does not deprive this Court of jurisdiction to review the judgment in this distinct *habeas* proceeding. See, *e.g.*, *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 70-71 (1928) (Supreme Court has jurisdiction to review final judgments disposing of ha-

beas claims even if further proceedings in the underlying criminal proceeding will follow); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565-568 (1947) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Official Code of Georgia, section 17-7-131, provides, in relevant part:

> (c)(3) The defendant [in a capital trial] may be found "guilty but mentally retarded" if the jury, or the court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.
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> * * *
>
> (j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

STATEMENT

This petition presents a split among state courts of last resort over what burden of proof may constitutionally be imposed on defendants seeking to prove that they are mentally retarded under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). In this case, the Supreme Court of Georgia held that a statute that requires defendants to prove their own mental retardation beyond a reasonable doubt does not deprive defendants of due process under the Fourteenth Amendment. See App., *infra*, 12a. The highest courts of two other states have upheld statutes requiring defendants to prove their own mental retardation by clear and convincing evidence. See *Colorado* v. *Vasquez*, 84 P.3d 1019 (Colo. 2004); *Arizona* v. *Grell*, 66 P.3d 1234 (Ariz. 2003). By contrast, seven other state courts of last resort have held that defendants should be required to prove their mental retardation by only a preponderance of the evidence. See note 2, *infra*. Petitioner seeks this Court's intervention to resolve this conflict among the states and to correct the Supreme Court of Georgia's fundamental errors in interpreting the United States Constitution.

1. In 1988 Georgia became the first state in the Nation to enact a law prohibiting the execution of any person determined to be mentally retarded. See GA. CODE ANN. § 17-7-131; *Atkins*, 536 U.S. at 313-314. The statute authorizes the trier of fact in a capital trial, at the close of the guilt/innocence phase, to enter a verdict of "guilty," "innocent," or "guilty but mentally retarded." GA. CODE ANN. § 17-7-131.[1] If the defendant is found "guilty but mentally

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[1] Georgia's "statutory definition of 'mentally retarded' is consistent with that supplied by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Third Edition 1980) * * *. The essential features of mental retardation [under Georgia's definition] are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impair-

retarded," the judge must sentence him or her to life in prison. GA. CODE ANN. § 17-7-131(j). Under Georgia's statute, the prosecution retains the burden of proving guilt, but the defendant bears the burden of proving his or her mental retardation beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(c)(3); *Burgess* v. *State*, 450 S.E.2d 680, 694 (Ga. 1994). Prior to this Court's decision in *Atkins*, the Supreme Court of Georgia repeatedly upheld this burden of proof, explaining that the Georgia legislature was free to limit the protection that it had granted to mentally retarded people and that neither the Georgia nor the Federal Constitution required the state to extend that protection to people who cannot prove their retardation beyond a reasonable doubt. See, *e.g.*, *Jenkins* v. *State*, 498 S.E.2d 502 (Ga. 1998); *Mosher* v. *State*, 491 S.E.2d 348 (Ga. 1997).

2. On June 20, 2002, this Court held that the execution of anyone who is mentally retarded is cruel and unusual punishment under the Eighth Amendment, and thus is prohibited by the United States Constitution. *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Because the question was not presented in *Atkins*, this Court did not address how its holding should be implemented, instead instructing the states to "develop[] appropriate ways to enforce the constitutional restriction upon [executing the mentally retarded]." *Id.* at 317 (internal quotation marks and citation omitted).

In the two years since *Atkins*, state legislatures and courts have been addressing the myriad procedural questions surrounding implementation of that decision, such as what definitions of mental retardation may a state use, at what point in a proceeding should a defendant's mental retardation be de-

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ment during the developmental period." *Stripling* v. *State*, 401 S.E.2d 500, 504 (Ga. 1991) (citing GA. CODE ANN. § 17-7-131(a)(3)) (reproduced at App., *infra*, 136a-149a). This definition is similar to those discussed by this Court in *Atkins*. See 536 U.S. at 308 n.3.

termined, on whom should the burden of proof be placed as to a defendant's mental retardation, and what standard of proof should be used in making that determination. See, *e.g.*, Adam Liptak, *New Challenge for Courts: How to Define Retardation*, N.Y. TIMES, Mar. 14, 2004, § 1 at 20.

One of these issues, in particular, has split state courts of last resort — the issue of what burden of proof can constitutionally be placed on defendants who are attempting to prove that they are mentally retarded. Since *Atkins*, the highest courts of seven states have held that defendants should be required to prove their own mental retardation by only a preponderance of the evidence.[2] By contrast, the highest courts in two other states have rejected constitutional challenges to the more restrictive clear-and-convincing-evidence standard.[3] Finally, in this and another contemporaneous case, the Supreme Court of Georgia upheld the constitutionality of a beyond-a-reasonable-doubt burden of proof. See App., *infra*, 12a; *Head* v. *Hill*, 587 S.E.2d 613, 620-622 (Ga. 2003) (reproduced at App., *infra*, 106a-135a).

This litigation and *Hill* are both capital habeas cases that were pending in different Georgia trial courts when *Atkins* was decided. In each case, the trial court held that GA. CODE ANN. § 17-7-131 violates the due process guarantees that accompany the United States Constitution's prohibition on the execution of mentally retarded people. See App., *infra*, 93a-

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[2] See *Ex parte Briseno*, No. 29,819-03, 2004 Tex. Crim. App. LEXIS 199, at *29-32 (Tex. Crim. App. Feb. 11, 2004); *Foster* v. *Mississippi*, 848 So.2d 172, 175 (Miss. 2003); *Pennsylvania* v. *Mitchell*, 839 A.2d 202, 210 n.8 (Pa. 2003); *Franklin* v. *Maynard*, 588 S.E.2d 604, 606 (S.C. 2003); *Louisiana* v. *Williams*, 831 So.2d 835, 859-860 (La. 2002); *Ohio* v. *Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002); *Murphy* v. *Oklahoma*, 54 P.3d 556, 567-568 (Okla. Crim. App. 2002), *cert. denied*, 123 S. Ct. 1795 (2003).

[3] See *Colorado* v. *Vasquez*, 84 P.3d 1019 (Colo. 2004); *Arizona* v. *Grell*, 66 P.3d 1234 (Ariz. 2003).

104a (*Stripling*); 113a (*Hill*). In opinions issued eight days apart, the Supreme Court of Georgia reversed those decisions in relevant part and upheld Georgia's use of the beyond-a-reasonable-doubt burden of proof. See App., *infra*, 12a (*Stripling*); 113a-117a (*Hill*).[4] These decisions issued over the strong dissent of three of the seven justices on the Supreme Court of Georgia, who explained that the Due Process Clause of the Fourteenth Amendment prevents states from using any burden of proof higher than a preponderance of the evidence. See App., *infra*, 13a (*Stripling*); 127a-135a (*Hill*) (citing and relying upon *Cooper* v. *Oklahoma*, 517 U.S. 348 (1996)). The majority rejected this application of federal due process principles, concluding that Georgia can apply whatever burden of proof it chooses "unless the Supreme Court of the United States [requires otherwise] at some future date." App., *infra*, 116a (*Hill*).

3. Although the Supreme Court of Georgia upheld as constitutional the beyond-a-reasonable-doubt burden of proof that had been used at Mr. Stripling's initial capital trial, it nonetheless overturned petitioner's death sentence because it found that at that trial the state violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by withholding evidence that would have helped the defense prove that Mr. Stripling is mentally retarded. App., *infra*, 2a-10a. The court therefore ordered the state to conduct a new criminal proceeding to determine whether Mr. Stripling is mentally retarded, and to determine the appropriate sentence to impose on him. *Id.* at 10a.[5] The

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[4] *Hill*, the first opinion released, contains the text of the court's reasoning (see App., *infra*, 113a-117a), which is cross-referenced in the decision in this case (see App., *infra*, 12a). It is our understanding that no petition for certiorari was filed in *Hill*.

[5] As the court recognized, a new sentencing phase will be necessary even if Mr. Stripling is unable to prove that he is mentally retarded because the evidence withheld during his initial trial might have convinced the jury to spare his life during the original

court specified that "[o]n retrial, Stripling must bear the burden of proving his alleged mental retardation beyond a reasonable doubt." *Id.* at 12a.

4. The focus of Mr. Stripling's defense has always been to prove his mental retardation rather than to prove his innocence. See App., *infra*, 21a; see also *Stripling* v. *State*, 401 S.E.2d 500, 502 (Ga. 1991) (direct appeal of Mr. Stripling's conviction) (reproduced at App., *infra*, 136a-149a). At his original trial, Mr. Stripling attempted unsuccessfully to meet the beyond-a-reasonable-doubt burden of proof. He submitted IQ scores of 68 and 64 (taken when he was 17 and 32 years old, respectively), produced evidence of deficits in his adaptive behavior (through the testimony of his mother), and put on two experts who testified that he is mentally retarded. See App., *infra*, 28a-33a, 138a-139a. The prosecution, however, cast doubt on the testimony of Stripling's mother, produced one apparently contrary test score, and put on an expert who testified to his "guesstimate" that Mr. Stripling's IQ is in the normal range. See *ibid.* In the end, the jury found that Mr. Stripling had not proven beyond a reasonable doubt that he is mentally retarded, entered a verdict of "guilty," and recommended that Mr. Stripling be executed. The trial court sentenced Mr. Stripling to die, and the Supreme Court of Georgia affirmed that sentence. App., *infra*, 148a.

Thereafter, Mr. Stripling brought this state habeas corpus proceeding, pursuant to GA. CODE ANN. § 9-14-48. During his habeas case Mr. Stripling introduced new evidence of his mental retardation (some of it gleaned from the concealed evidence that formed the basis of his *Brady* claim) and discredited the state's supposedly contrary evidence. See App.,

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sentencing phase *even if* that evidence had not convinced the jury that he had proved his mental retardation beyond a reasonable doubt. See App., *infra*, 10a.

infra, 33a-53a. However, in the forthcoming criminal proceeding he again faces the task of eliminating all reasonable doubt about his mental retardation. The State has indicated that it intends to retry this case aggressively in an effort to create reasonable doubt about Mr. Stripling's mental retardation and to secure a sentence of death. See Bill Rankin, *Inmate on Death Row Wins Appeal*, ATLANTA J. CONST., Oct. 15, 2003, at 1C.

REASONS FOR GRANTING THE PETITION

In *Atkins*, this Court instructed the states to "develop[] appropriate ways to enforce the constitutional restriction upon [executing the mentally retarded]." 536 U.S. at 317 (internal quotation marks and citation omitted). Now that almost two years have passed and many states have attempted to fulfill this edict, this Court's intervention once again is necessary. The states are split on what burden of proof is permissible under the Due Process Clause when determining a defendant's mental retardation, a question only this Court can resolve. Furthermore, the decision below, which upheld a statute placing the highest possible burden of proof on defendants seeking to prove their mental retardation, eviscerates not only *Atkins* but also broader principles of federal due process — and therefore warrants this Court's attention.

Although the Georgia General Assembly is the only legislature to date to adopt a beyond-a-reasonable-doubt standard — and thus the Supreme Court of Georgia is the only state court of last resort that has been asked to consider whether that standard complies with due process — the highest courts of Arizona and Colorado have upheld statutes requiring defendants to prove their mental retardation by clear and convincing evidence. Standing in stark contrast to these decisions are the opinions of the highest courts of seven other states, which have held that the appropriate burden of proof under *Atkins* requires defendants to prove their mental retar-

dation by a preponderance of the evidence. This split of authority on an important question of constitutional law cries out for review. See Part I.A.

Prompt resolution of the existing split is also warranted to provide guidance for state legislatures and courts that currently must resolve questions of the appropriate burden of proof in the face of contradictory holdings from their sister states. See Part I.B. The legislatures in a significant number of death-penalty states have not yet enacted laws giving effect to *Atkins*. Similarly, a number of death-penalty states have barred the execution of mentally retarded people but require defendants to prove their own mental retardation under a standard higher than a preponderance of the evidence — and most of these statutes have not been subjected to constitutional challenge since *Atkins*. As state legislatures continue to attempt to bring their laws into compliance with *Atkins* and the requirements of due process, and as state courts of last resort continue to hear challenges to those laws, the already-existing split among the states will only grow deeper. This is particularly true now that Georgia has held that the beyond-a-reasonable-doubt standard is a constitutional method of implementing *Atkins*. Therefore, prompt review by this Court not only will resolve the existing split but will also provide clarity for the state courts and legislatures across the country that are struggling to implement *Atkins*.

Review in this case would be warranted, however, even were there no split of authority over what burden of proof is constitutional, because the decision below is so clearly erroneous and is based on a fundamental misunderstanding of this Court's precedents. The Supreme Court of Georgia has mistakenly interpreted this Court's delegation of responsibility for the development of procedural rules to implement *Atkins* (see 536 U.S. at 317) as license to place unreasonable obstacles in the path of defendants seeking *Atkins* relief, as if there were no due process constraints on state actions. By

upholding a Georgia statute that prevents executions only when a defendant has proven his or her mental retardation by the highest burden of proof recognized by law, the Supreme Court of Georgia has authorized a procedure that eviscerates the substance of *Atkins*. In essence, it has said that although the Constitution prohibits the execution of mentally retarded people, Georgia may continue to execute defendants who have demonstrated that that they are *more likely than not* mentally retarded and may even execute defendants who have shown their mental retardation *by clear and convincing evidence*, so long as there is *any* reasonable doubt about whether they are mentally retarded. This decision fundamentally undermines *Atkins*, and is unsupportable as a constitutional matter. See Part II.A. It is also based on a fundamental misunderstanding of this Court's decisions in *Cooper* v. *Oklahoma*, 517 U.S. 348 (1996), and *Leland* v. *Oregon*, 343 U.S. 790 (1952). If left uncorrected, the decision therefore threatens to undermine basic principles of federal due process by giving states unlimited discretion to impose oppressive procedures on defendants who are attempting to assert their constitutional rights — a result that is prohibited by a correct interpretation of *Cooper* and *Leland*. See Part II.B.

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE GROWING SPLIT AMONG THE STATES OVER WHAT BURDEN OF PROOF MAY CONSTITUTIONALLY BE IMPOSED ON DEFENDANTS ATTEMPTING TO PROVE THEIR OWN MENTAL RETARDATION.

A. The Split Among State Courts Of Last Resort Warrants This Court's Resolution.

In this case and in *Hill*, the Supreme Court of Georgia held that even though the Constitution prohibits the execution of mentally retarded people, Georgia can require defendants to prove their mental retardation beyond a reasonable

doubt before they may invoke this constitutional right. App., *infra*, 12a (*Stripling*); App., *infra*, 113a-117a (*Hill*). The Supreme Court of Georgia's decisions fall on one side — the wrong side (see Part II, *infra*) — of a split among state courts of last resort over what burdens of proof can survive constitutional scrutiny in the *Atkins* context. Georgia joins Arizona and Colorado as states whose highest courts have approved the use of burdens higher than a preponderance of the evidence; both the Supreme Court of Arizona and the Supreme Court of Colorado have upheld as constitutional statutes that require defendants to prove their mental retardation by clear and convincing evidence. See *Colorado* v. *Vasquez*, 84 P.3d 1019 (Colo. 2004); *Arizona* v. *Grell*, 66 P.3d 1234 (Ariz. 2003).

In stark contrast, the highest courts in the states of Louisiana, Mississippi, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas have issued opinions that are inconsistent with the application of any burden higher than a preponderance of the evidence.[6] For example, the Supreme Court of Louisiana "adopt[ed] the preponderance of evidence standard in the *Atkins* context" because "[r]equiring a defendant to prove by clear and convincing evidence he is exempt from capital punishment by reason of mental retardation would significantly increase the risk of an erroneous determination that he is not mentally retarded." *Louisiana* v. *Williams*, 831 So.2d 835, 859-860 (La. 2002) (citing *Cooper* v. *Oklahoma*, 517 U.S. 348 (1996)). The Court of Criminal Appeals of Texas — the highest court in Texas for criminal matters — recently surveyed contemporary practice in all other states

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[6] *Ex parte Briseno*, No. 29,819-03, 2004 Tex. Crim. App. LEXIS 199, at *29-32; *Foster* v. *Mississippi*, 848 So.2d at 175; *Pennsylvania* v. *Mitchell*, 839 A.2d at 210 n.8; *Franklin* v. *Maynard*, 588 S.E.2d at 606; *Louisiana* v. *Williams*, 831 So.2d at 859-860; *Ohio* v. *Lott*, 779 N.E.2d at 1015; and *Murphy* v. *Oklahoma*, 54 P.3d at 567-568.

and determined that the appropriate standard after *Atkins* is proof by a preponderance of the evidence. *Ex parte Briseno*, No. 29,819-03, 2004 Tex. Crim. App. LEXIS 199, at *29-32 (Tex. Crim. App. Feb. 11, 2004).

To resolve this conflict among the states on an important question of constitutional law, this Court should grant the petition for certiorari.

B. The Split Among State Courts Will Only Grow Deeper Over Time, And Those States Currently Struggling To Comply With *Atkins* Would Benefit From This Court's Guidance.

Legislatures and courts across the country are struggling to implement *Atkins*, and in particular to decide the appropriate burden of proof for the determination of whether a defendant is mentally retarded. At last count, 26 of the 38 states that impose the death penalty have established statutory procedures for preventing the execution of mentally retarded defendants. The majority of those states — 17 — require proof of mental retardation by only a preponderance of the evidence.[7] The burden of proof is not specified in the statutes

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[7] These 17 states are Arkansas (ARK. CODE ANN. § 5-4-618(c) (Michie 2003)), California (CAL. PEN. CODE § 1376(b)(3) (Deering 2003)), Idaho (IDAHO CODE § 19-2515A(3) (Michie 2003)), Illinois, (725 ILL. COMP. STAT. 5/114-15(b) (2004)), Louisiana (LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (West 2004)), Maryland (MD. CODE ANN. CRIM. LAW § 2-202(b)(2)(ii) (2003)), Missouri (MO. REV. STAT. § 565.030(4) (2004)), Nebraska (NEB. REV. STAT. ANN. § 28-105.01(4) (Michie 2003)), Nevada (NEV. REV. STAT. ANN. 174.098(5)(b) (Michie 2004)), New Mexico (N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 2003)), New York (N.Y. CRIM. PROC. LAW § 400.27(12) (Consol. 2003)), North Carolina (N.C. GEN. STAT. ANN. § 15A-2005(f) (2004)), South Dakota (S.D. CODIFIED LAWS § 23A-27A-26.3 (Michie 2003)), Tennessee (TENN. CODE ANN. § 39-13-203(c) (2003)), Utah (UTAH CODE ANN. § 77-15a-104(12)(a) (2003)), Virginia (VA.

enacted by three states.[8] Five states, however, require proof by the more stringent clear-and-convincing-evidence standard.[9] Georgia stands alone, so far, as the only state that allows the execution of any person who cannot eliminate all reasonable doubt about whether he or she is mentally retarded. See GA. CODE ANN. § 17-7-131. Of the eight statutes that have been enacted since this Court decided *Atkins*, seven states have adopted a preponderance-of-the-evidence standard,[10] and one — Delaware — has required defendants to prove their mental retardation by clear and convincing evidence.

In 6 of the 12 death-penalty states with no statute prohibiting the execution of mentally retarded people, the courts have stepped in to create a procedure for enforcing *Atkins*.[11] Each of those courts has held that defendants should be required to prove their mental retardation by only a preponder-

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CODE ANN. § 19.2-264.3:1.1(C) (Michie 2003)), and Washington (WASH. REV. CODE § 10.95.030(2) (West 2004)).

[8] These three states are Connecticut (CONN. GEN. STAT. § 53a-46a (2003)), Kansas (KAN. STAT. ANN. § 21-4623 (2003)), and Kentucky (KY. REV. STAT. ANN. § 532.130-140 (Michie 2002)). No court in these states has yet reached the issue, either.

[9] These five states are Arizona (ARIZ. REV. STAT. § 13-703.02(G) (2003)), Colorado (COLO. REV. STAT. § 18-1.3-1102(2) (2003)), Delaware (DEL. CODE ANN. tit. 11, § 4209(d)(3) (2004)), Florida (FLA. STAT. ch. 921.137(4) (2003)), and Indiana (IND. CODE ANN. § 35-36-9-4(b) (2004)).

[10] These states are California, Idaho, Illinois, Louisiana, Nevada, Utah, and Virginia.

[11] See *Ex parte Briseno*, No. 29,819-03, 2004 Tex. Crim. App. LEXIS 199, at *29-32; *Foster* v. *Mississippi*, 848 So.2d at 175; *Pennsylvania* v. *Mitchell*, 839 A.2d at 210 n.8; *Franklin* v. *Maynard*, 588 S.E.2d at 606; *Ohio* v. *Lott*, 779 N.E.2d at 1015; and *Murphy* v. *Oklahoma*, 54 P.3d at 567-568.

ance of the evidence. Some of the statutory schemes that the remaining six states have considered but failed to enact would have required proof by a preponderance of the evidence, whereas others would have required proof by clear and convincing evidence.[12]

Thus, in addition to the three states in which the court of last resort has upheld either a clear-and-convincing or a beyond-a-reasonable-doubt burden of proof — Arizona, Colorado, and Georgia — there are at least twelve states that may yet approve a burden of proof higher than a preponderance of the evidence: nine states in which neither the courts nor the legislature have resolved the question,[13] two states that enacted clear-and-convincing-evidence standards before *Atkins* and no court has yet determined whether that statute is constitutional after *Atkins*,[14] and one state — Delaware — that enacted a clear-and-convincing-evidence standard after *Atkins*, the constitutionality of which has not yet been decided by any court.

Those states still struggling to implement *Atkins* cannot resolve the existing split between their sister states over what burden of proof is permissible under the Federal Due Process Clause; this Court's intervention is required. The existence of state-court decisions approving burdens of proof higher than a preponderance of the evidence — and even, in this case, upholding as constitutional the beyond-a-reasonable-doubt standard — will affect the twelve states in which the law is still developing. Without this Court's guidance, legis-

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[12] Compare S. 147 § 1, 211th Leg., 2004 Sess. (N.J. 2004) (proposing amendment to N.J.S.2C:11-3(g)(b)) (preponderance), with H.B. 229 § 1(b)(3), Reg. Sess. 2004 (Ala. 2004) (clear and convincing).

[13] These states are: Alabama, Connecticut, Kansas, Kentucky, Montana, New Hampshire, New Jersey, Oregon, and Wyoming.

[14] These states are Florida and Indiana.

latures may continue to enact statutes imposing unconstitutionally high burdens of proof; even the beyond-a-reasonable-doubt burden of proof may be enacted by other states in reliance on the Supreme Court of Georgia's decision. And without this Court's guidance, state courts may continue to allow death sentences to be imposed under unconstitutionally high burdens of proof — sentences that will result in unconstitutional executions, wasteful relitigation, or both.

The fact that Mr. Stripling may be able to prove his mental retardation beyond a reasonable doubt in the forthcoming criminal proceeding (see pages 6-7, *supra*) does not make resolution of this issue any less appropriate or pressing. Mr. Stripling is one of a number of capital defendants in Georgia with credible claims of mental retardation, and there are surely others with credible claims of mental retardation in Arizona and Colorado. Were this Court to deny certiorari now, those states and others that may begin to litigate credible claims of mental retardation under heightened burdens of proof will be required to re-litigate a significant number of those claims if and when this Court grants certiorari on the question and holds that standards higher than a preponderance cannot constitutionally be imposed on defendants. Thus, many of the same reasons that suggest that certiorari review is warranted even of certain *interlocutory* state-court decisions on federal constitutional questions (see *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)) also support granting certiorari in this case to review the *final* decision on the merits in this state habeas corpus case.

* * * * *

Because there is an existing split among state courts of last resort on the constitutionality of burdens of proof for establishing mental retardation, because this split will only grow deeper over time, because this is a developing area of law where guidance from this Court is needed, and because

there are potentially enormous costs from delay, the Court should take this opportunity to resolve this issue now.

II. REVIEW IS ALSO WARRANTED BECAUSE THE DECISION BELOW IS CLEARLY WRONG, AND IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S PRECEDENTS.

Even if there were no split of authority on the question presented, this Court's review would be warranted because the decision below is based on a manifestly incorrect reading of this Court's precedents, and is clearly wrong.

A. It Is Plainly Unconstitutional To Require Defendants To Prove Their Own Mental Retardation Beyond A Reasonable Doubt.

The fact that this Court did not dictate precise procedures for enforcing *Atkins* — but instead left that task to the states in the first instance — did not alter the constitutional guarantees of procedural due process under the Fourteenth Amendment. When a state enacts a procedure that regulates defendants' ability to obtain the protection of a federal constitutional right, that procedure must of course comply with the Due Process Clause, and more specifically, with the three-part test that this Court announced in *Cooper* v. *Oklahoma*, 517 U.S. 348 (1996). According to *Cooper*, state procedures regulating constitutional rights are analyzed in light of historical practice, contemporary practice, and fundamental fairness. *Id.* at 355-362. As the three dissenting justices of the Supreme Court of Georgia recognized after performing a *Cooper* analysis, the requirement that defendants prove their own mental retardation beyond a reasonable doubt cannot be reconciled with the constitutional guarantee of Due Process. See App., *infra*, 13a (*Stripling*); *id.* at 127a-135a (*Hill*); see also *id.* at 93a-104a (habeas court).

Historical practice is of limited relevance here because the medical diagnosis of mental retardation is a modern de-

velopment. See App., *infra*, 99a-100a. Contemporary practice, however, strongly favors application of the preponderance-of-the-evidence standard and universally militates against the beyond-a-reasonable-doubt burden of proof. Of the 29 states where the burden of proof for mental retardation has been decided by either legislatures or courts, Georgia is the only one willing to impose the beyond-a-reasonable-doubt burden on defendants, and the majority, 23, have chosen the preponderance standard. See page 12-13, *supra*. Georgia's procedures are inconsistent with contemporary practice and are thus inappropriate to protect a federal constitutional right. See App., *infra*, 134a (*Hill*) (Fletcher, J., dissenting); *Briseno*, 2004 Tex. Crim. App. LEXIS 199, at *29-32.

As to the third prong of *Cooper*'s test — fundamental fairness — the habeas court and the dissent in the Supreme Court of Georgia were plainly correct to find that "it is fundamentally unfair to require people who are mentally retarded to bear such a high burden and to carry such a high risk of wrongful determination when the cost of error is their life." App., *infra*, 102a; see also *id.* at 132a-135a.

Under a heightened burden of proof, many mentally retarded defendants will be executed.[15] This is unfair not only

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[15] The vast majority of mentally retarded people — approximately 85% — fall into the "mild retardation" category, with IQ scores between 50 and 70. See American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 40-41 (4th ed. 1994). Because these people may not *seem* mentally retarded to lay juries because they lack stereotypical physical features and mannerisms, because they may have developed adaptive skills in certain areas, and because they may test in or near the margin of error for IQ scores that indicate mental retardation, many of these people will be unable to eliminate all doubt about their mental retardation or even to prove by clear and convincing evidence that they are mentally retarded. See, *e.g.*, Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases:*

to these vulnerable citizens, but also to our society as a whole. This Court has recognized that "standard[s] of proof reflect" not only "the importance of a particular adjudication," but "also serve[] as a societal judgment about how the risk of error should be distributed between the litigants." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (quotation marks and citation omitted). In addition to the obvious harm suffered by people who are wrongfully executed, we as a society are profoundly injured when individuals who should not be subjected to capital punishment are put to death. Therefore, "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability * * * [because] execution is the most irremediable and unfathomable of penalties." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986).

An appropriate burden of proof "is especially crucial when dealing with the mentally retarded, whose diminished capacities leave them vulnerable to a unique and significant risk of being wrongfully executed." App., *infra*, 133a (*Hill*) (Fletcher, J., dissenting); see also *Atkins*, 536 U.S. at 321 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution."). Here, "[f]ar from 'jealously guarding' the fundamental right of the mentally retarded to avoid execution [the beyond-a-reasonable-doubt burden of proof] subjects them to this heightened risk, thereby increasing the likelihood of erroneous rejections of retardation claims, which will invariably lead to wrongful executions." App., *infra*, 133a (*Hill*), Fletcher, J., dissenting) (quoting *Cooper*, 517 U.S. at 363); see also *Williams*, 831 So.2d 835, 859-60 (reaching the same conclusion for the

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Finding the "Invisible" Defendant, 22 MENTAL & PHYSICAL DISABILITIES L. REP. 529, 530-531 (1998); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-431 (1985).

clear-and-convincing-evidence standard). This is profoundly — "fundamentally" — unfair not only to these defendants, but also to Americans generally, whose confidence in our justice system will be undermined if, despite *Atkins*, people who are more-likely-than-not mentally retarded are nonetheless executed.

The concluding paragraph in the dissent from the Supreme Court of Georgia's opinion in *Hill* summarizes the point well, and is worth quoting at length:

> Despite the federal ban on executing the mentally retarded, Georgia's statute, and the majority decision upholding it, does not prohibit the state from executing mentally retarded people. To the contrary, the State may still execute people who are in all probability mentally retarded. * * * The State may even execute people who are almost certainly mentally retarded. Only if a mentally retarded person succeeds in proving their retardation beyond a reasonable doubt will his or her execution be halted. * * * [T]his situation violates the [tenets] of due process as that concept is embodied in our Federal Constitution.

App., *infra*, 134a-135a.

In sum, it is fundamentally unfair, and an abrogation of our Constitution's due process guarantees, for states to allow the execution of people who are clearly and convincingly — or even more likely than not — entitled to be free from execution under the Eighth Amendment. Georgia's use of the beyond-a-reasonable-doubt burden of proof invites violations of the Eighth Amendment by forcing mentally retarded people to meet the most onerous evidentiary standard in our legal system before the state will protect their right to be free from cruel and unusual punishment. Such a blatant violation of constitutional due process guarantees cannot be allowed to stand.

B. The Supreme Court of Georgia Based Its Decision On A Fundamental Misinterpretation Of This Court's Decisions In *Cooper* v. *Oklahoma* And *Leland* v. *Oregon*.

In *Hill*, the Supreme Court of Georgia refused even to undertake the due process analysis required by *Cooper*. That refusal was based on a fundamental misunderstanding of this Court's precedents, which independently warrants this Court's review and correction.

The Supreme Court of Georgia explained its ruling as follows:

> [Because] a mental retardation claim is comparable to a claim of insanity at the time of the crime * * * we took guidance from *Leland v. Oregon* * * * which approved application of the beyond a reasonable doubt standard to insanity claims, [and] we again distinguish the fundamental right not to stand trial implicated in *Cooper v. Oklahoma* * * * from the procedural burden of proving mental retardation[;] * * * we believe that *Cooper* should not be extended to retardation decisions unless the Supreme Court of the United States so requires at some future date.

App., *infra*, 115a-116a (*Hill*). But contrary to this reasoning, it is irrelevant that both *Leland* and this case involve an attempt to foreclose certain punishments whereas *Cooper* involves an attempt to avoid trial entirely. The true distinction between *Cooper* and *Leland* is not the *effect* of asserting the right in question, but the *source* of that right.

Cooper, like this case, involves a federal constitutional right — the right not to be tried if incompetent — whereas *Leland* involves only a state-enacted affirmative defense — the statutory defense of insanity at the time of the crime. See *Leland*, 343 U.S. at 798 ("Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill

of Rights").[16] "Unlike [*Leland*], which concerned procedures for proving a *statutory* defense," *Cooper* made clear that it was establishing a test for determining "whether a State's procedures for guaranteeing a fundamental *constitutional right* are sufficiently protective of that right." *Cooper*, 517 U.S. at 367-368 (emphasis added). Therefore, *Cooper*, not *Leland*, supplies the rule of decision in this case.

The Supreme Court of Georgia's misinterpretation of these cases not only resulted in its failure to conduct the appropriate due process analysis here, but, if adopted by other courts or applied by Georgia in other contexts, would more generally authorize states to enact procedural rules that eviscerate the rights guaranteed by the United States Constitution. On the basis of its misinterpretation, the court refused to apply *Cooper* beyond the facts of that case, holding that "*Cooper* should not be extended to retardation decisions unless the Supreme Court of the United States so requires at some future date." App., *infra*, 116a (*Hill*). Instead of recognizing that the constraints of federal due process apply to *any* rule of criminal procedure that affects a constitutional guarantee, the Supreme Court of Georgia determined that state procedures are subject to the permissive rule of *Leland* unless and until this Court explicitly holds that the underlying constitutional right deserves due process protection. That conclusion is inconsistent with the Fourteenth Amendment and this Court's decision in *Cooper*. It is such a fundamental error of law that review should be granted to correct it and to prevent further erosion of federal due process jurisprudence.

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[16] Indeed, Oregon was perfectly free to eliminate the affirmative defense of insanity *entirely*. See *Idaho* v. *Searcy*, 798 P.2d 914, 917-918 (Idaho 1990) (upholding a statute that abolished the defense of insanity and noting that Idaho, Montana and Utah do not recognize such a defense).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2004

APPENDIX

SUPREME COURT OF GEORGIA

HEAD

v.

STRIPLING

No. S03A0525.

Oct. 14, 2003.
Reconsideration Denied Nov. 26, 2003

HUNSTEIN, Justice.

In October 1988 Alphonso Stripling shot four of his fellow employees at a Kentucky Fried Chicken restaurant during an armed robbery. Two of his victims died. He then carjacked a getaway car at gunpoint from the parking lot of a nearby restaurant and crashed it while being chased by the police. At his 1989 trial, Stripling's counsel presented evidence of mental illness and mental retardation. The jury, while convicting Stripling of the crimes arising out of the KFC robbery, did not find him guilty but mentally ill or guilty but mentally retarded. The jury recommended a death sentence. This Court affirmed. *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991).

Stripling filed a petition for a writ of habeas corpus. After an evidentiary hearing in April 2002, the habeas court vacated Stripling's death sentence finding that the State had violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by suppressing evidence supporting his claim of mental retardation. Warden Frederick Head appeals that ruling, along with the habeas court's other rulings, including that Stripling be sentenced to a non-capital sentence based on a finding that his death sentence was a miscarriage of justice because he is mentally retarded; that OCGA § 17-7-131 is unconstitutional to the extent that it requires a defendant to prove his mental retardation beyond a reasonable

doubt in the guilt-innocence phase of a death penalty trial; and that Stripling received ineffective assistance of trial counsel. For the reasons set forth below, we affirm the habeas court's ruling on Stripling's *Brady* claim and order that he be retried on mental retardation and sentence.

1. The habeas court correctly ruled that the State violated *Brady* by suppressing parole records that contained material, exculpatory evidence regarding Stripling's mental retardation. According to trial counsel, Stripling's death penalty trial may have been the first where guilty but mentally retarded was a potential verdict. OCGA § 17-7-131 had only been enacted the previous year, and Georgia was the first state to forbid the execution of those criminals found to be mentally retarded.[1] In preparation for Stripling's trial, defense counsel researched mental retardation and Stripling's background. Defense counsel also sought to obtain Stripling's parole file because they believed there might be important evidence contained therein. "Records in the possession of the State Board of Pardons and Paroles are confidential. OCGA § 42-9-53." *Stripling, supra*, 261 Ga. at 6(7), 401 S.E.2d 500. Pursuant to this Court's holding in *Pope v. State*, 256 Ga. 195(22), 345 S.E.2d 831 (1986) (policy reasons for preserving the secrecy of parole files must give way to capital defendant's need to uncover and present mitigating evidence), the trial court in Stripling's case received the pa-

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[1] OCGA § 17-7-131(a)(3) defines mental retardation as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." While not by itself conclusive, the generally accepted IQ score for an indication of mental retardation is approximately 70 or below. *Stripling, supra*, 261 Ga. at 4(3), 401 S.E.2d 500(b). Other indicators for mental retardation are deficits in adaptive behavior and an onset before age eighteen. *Id.*

role file and evaluated it in camera. The trial court then informed the parties that there was relevant evidence in the parole file but that it was cumulative to the testimony of Stripling's psychiatrist, who had testified in the competency trial that had preceded the death penalty trial. The trial court did not release the parole file and neither the prosecutor nor Stripling's counsel saw its contents.

At trial, defense counsel adduced evidence before the jury that Stripling had achieved mostly D's and F's before leaving high school at age 16, and his mother testified that he had been a slow learner and had few friends as a child. A psychiatrist and a psychologist hired by the defense evaluated Stripling for mental retardation and mental illness. The psychologist administered an IQ test to Stripling, who scored a 64. The defense mental health experts also testified about deficits in adaptive behavior, such as his limited ability to read and write, and opined that he is mentally retarded. Because Stripling had been incarcerated twice previously for armed robberies, defense counsel obtained his records from the Department of Corrections, which showed he had scored a 68 on an IQ test in 1974 when he was 17 years old and that his reading and mathematics skills were limited to approximately the third or fourth grade level.

The State countered Stripling's claim of mental retardation by adducing evidence that Stripling had attended school until the tenth grade and dropped out because of his arrest for several armed robberies. Although he did not administer an IQ test, the State's psychologist evaluated Stripling and opined that he has average intelligence. With regard to adaptive behavior, the State presented evidence that Stripling held several jobs, had a driver's license, and knew how to drive a car with a manual transmission. Neither of the surviving KFC employees thought that he had seemed slow or had difficulty learning to operate the various machines for marinat-

ing and cooking chicken.[2] Stripling had participated in bank robberies in 1979 and 1980 that showed some degree of planning. His Department of Corrections records indicated that he had taken vocational training classes in prison and performed satisfactorily. There were several references in the prison records to his having a "rather low level of intellectual functioning," but these references were offset by written comments about his low motivation to perform better and by other comments that Stripling has a normal level of intelligence. Of primary importance to the State was a Culture Fair IQ test also taken in prison that showed a score of 111. Neither of Stripling's experts was familiar with the Culture Fair test, and the State argued that this above-average score was more indicative of Stripling's intelligence. His prison and school records did not indicate he was mentally retarded, despite, as previously mentioned, a Peabody IQ test taken in prison in 1974 that reflected a 68 IQ. The prosecutor thus argued that no one had characterized Stripling as mentally retarded until defense experts examined him after the KFC murders when he had a motive to portray himself as mentally retarded.[3]

In his appeal to this Court, Stripling not only challenged the jury's rejection of a guilty but mentally retarded verdict, he also claimed that the failure to release his parole file was er-

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[2] Stripling had only been working at KFC for about a week when he committed the robbery and murders.

[3] For example, the prosecutor argued:

> [I]f there was mental illness or mental retardation in Alphonso Stripling, do you think maybe possibly somebody might have caught it before now? Maybe? You think so? Isn't it a peculiar coincidence that we've suddenly discovered that Alphonso was mentally ill and mentally retarded two months before he goes on trial for the electric chair?

ror, despite not knowing what that file contained. This Court disagreed. *Stripling, supra*, 261 Ga. at 6(7), 401 S.E.2d 500.

More than a decade after Stripling's trial, his habeas counsel was able to secure access to his parole file during habeas corpus litigation. The parole file contains a number of documents that were duplicated in Stripling's DOC prison records. However, the parole file also contains information supporting Stripling's claim of mental retardation that was not available elsewhere. An institutional report from 1974 set forth that Stripling has "serious mental deficiencies." A parole investigator in a 1980 report stated that the Culture Fair IQ score of 111 was "questionable" because Stripling's mother characterized him as "mentally retarded" and an IQ test taken in 1973, which was not referenced in the materials elsewhere available to defense counsel, recorded an IQ score of 67. The investigator described Stripling as having "limited mental ability." An institutional parole supervisor interviewed Stripling in 1974, when Stripling was 17 years old, and reported that he answered questions slowly "due to his mentally retarded condition." The supervisor stated in his concluding remarks that Stripling has limited mental ability and "is mentally retarded."

The parole file thus contained compelling evidence to support Stripling's trial claim of mental retardation. That State officials and his mother had characterized him as mentally retarded in the 1970's would have refuted the prosecutor's claim that the defense had recently concocted his alleged mental retardation. Similarly, a State official describing Stripling's score on the Culture Fair IQ test as "questionable" would have undermined the prosecutor's reliance on this test as direct evidence of his actual intelligence. The parole file also contained another sub-70 IQ score on an IQ test taken when Stripling was 16 years old. All of this evidence would have been especially significant because it predated the KFC murders and was created by State officials.

The trial court did not permit defense counsel to see this file; thus, counsel were not able to argue the benefits and potential effect of using this evidence at trial to support Stripling's mental retardation claim. Counsel could make no specific claims about the file at trial or on appeal. Instead, on appeal Stripling could only argue generally that the failure to allow access to the contents of the file was error. See *Pope*, *supra*, 256 Ga. at 212(22), 345 S.E.2d 831; *Walker v. State*, 254 Ga. 149(4), 327 S.E.2d 475 (1985). This Court noted that the trial court had found "no potentially mitigating evidence in the file not already known to and available to the defendant," *Stripling*, *supra*, 261 Ga. at 6(7), 401 S.E.2d 500, and determined that the trial court had not erred. *Id.*

On habeas corpus, after finally obtaining access to the parole file, Stripling made a claim under *Brady* that the State had suppressed exculpatory evidence in the parole file.[4] The warden responded that the issue was barred from habeas review because it had been addressed on direct appeal when this Court determined that there was no error in the nondisclosure of the parole file. See *Turpin v. Lipham*, 270 Ga. 208(1), 510 S.E.2d 32 (1998). However, the record clearly establishes that Stripling did not claim *Brady* error on direct appeal; he only claimed error under *Pope*, *supra*. Nor could a *Brady* error have been asserted on appeal because Stripling did not know what was contained in the parole file and thus could only have speculated about the withheld material.

> If the trial court performs an in camera inspection and denies the defendant access to certain information, on appeal the appellant has the burden of showing both the materiality and the favorable nature of the evidence sought. [Cit.] Mere speculation that the items the appellant wishes to review possibly contain exculpatory infor-

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[4] Stripling had also filed a *Brady* motion before his 1989 trial.

> mation does not satisfy this burden. "If the appellant desires to have this inspection reviewed by this court, she must point out what material she believes to have been suppressed and show how she has been prejudiced." [Cit.]

Williams v. State, 251 Ga. 749, 789, 312 S.E.2d 40 (1983). See also *Ledesma v. State*, 251 Ga. 487(10), 306 S.E.2d 629 (1983).

Because Stripling's argument on direct appeal regarding the parole file was not a *Brady* claim, we conclude that no procedural bar foreclosed the habeas court from addressing this claim on the merits on habeas corpus. Compare *Roulain v. Martin*, 266 Ga. 353(1), 466 S.E.2d 837 (1996). Moreover, procedural default did not operate to prevent the habeas court's consideration of Stripling's *Brady* claim because Stripling could not have raised such a claim before learning about the contents of the parole file. See *Williams*, *supra*, 251 Ga. at 789, 312 S.E.2d 40; *Turpin v. Todd*, 268 Ga. 820(2), 493 S.E.2d 900 (1997) (explaining cause and prejudice test for overcoming procedural default). Thus, we agree with the habeas court that this issue is not procedurally barred or defaulted.

With regard to the merits of Stripling's *Brady* claim, the habeas court found that such a violation had occurred and that Stripling must be retried. In so holding, the habeas court found that Stripling showed that: (A) the State possessed evidence favorable to his defense; (B) he did not possess the evidence, nor could he obtain it himself with any reasonable diligence; (C) the State suppressed the favorable evidence; and (D) had the evidence been disclosed to him, there is a reasonable probability that the outcome of his trial would have been different. See *Mize v. State*, 269 Ga. 646(2), 501 S.E.2d 219 (1998); *Zant v. Moon*, 264 Ga. 93, 100, 440 S.E.2d 657 (1994). Our review of the record reflects that the evidence amply supports the habeas court's findings. (A)

The State possessed the parole file. The record shows that the Attorney General's office possessed the file before trial and transmitted it to the trial court for review. Although the Attorney General represents the State on appeals in death penalty cases (OCGA § 45-15-3(5)), the Attorney General's office usually does not become involved with death penalty cases at the initial trial level. Therefore, it is generally not part of the "prosecution team" for which the prosecutor must make disclosures under *Brady*. See *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (an individual prosecutor is presumed to have knowledge of all information gathered in connection with his office's investigation of the case and has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"); *Zant v. Moon*, 264 Ga. 93(3), 440 S.E.2d 657 (1994). Our definition of the prosecution team responsible for *Brady* disclosures cannot be a monolithic view of government that would impute to the prosecutor the knowledge of persons in state agencies not involved in the prosecution. See *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998). Such a wide definition would be unworkable. See *id.* However, in Stripling's case, his parole file was not held unbeknownst to the prosecutor by a state agency uninvolved in the prosecution. Litigation over the parole file was a part of the case and the Attorney General became directly involved on behalf of the state of Georgia on the *specific* issue of Stripling's request to see his parole file. "For purposes of *Brady*, we decide whether someone is on the prosecution team on a case-by-case basis by reviewing the interaction, cooperation and dependence of the agents working on the case." (Footnote omitted.) *Harridge v. State*, 243 Ga.App. 658, 660-661(1), 534 S.E.2d 113 (2000). See also *Moon*, *supra*; *Ferguson v. State*, 226 Ga.App. 681(2), 487 S.E.2d 467 (1997). We conclude, under the circumstances of this case, that the Attorney General's Office became a part of the prosecution team at Stripling's trial due to its involve-

ment over the parole file and that it possessed evidence favorable to Stripling's case. See *Harridge*, *supra* (GBI laboratory part of prosecution team due to its testing of defendant's blood and victim's blood and urine). Compare *Black v. State*, 261 Ga.App. 263(3), 582 S.E.2d 213 (2003) (Department of Family and Children Services not part of the prosecution team for *Brady* purposes).

(B) It is uncontroverted that Stripling did not possess this evidence and could not obtain it despite diligent efforts to do so. The key evidence contained in the parole file was not available elsewhere. To the extent that our opinion on direct appeal implies that the trial court correctly determined that the evidence was cumulative of evidence already in Stripling's possession, we conclude that this finding was based on an incorrect reading of the record. See *Brown v. Francis*, 254 Ga. 83(3), 326 S.E.2d 735 (1985) (this Court has the inherent discretionary power to review and correct its own errors).

(C) With regard to the third element of a *Brady* claim, the record shows that the State suppressed the parole file. It is immaterial that the State had a good motive, namely, the statutorily-imposed confidentiality of parole files, because the good or bad faith of the government is irrelevant to the determination of a *Brady* claim. See *Brady*, *supra*, 373 U.S. at 87, 83 S.Ct. 1194 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). Moreover, a state statute regarding parole file confidentiality cannot trump a capital defendant's constitutional rights. See *Davis v. Alaska*, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (state's policy interest in protecting confidentiality of juvenile offender's record must yield to defendant's constitutional right to effective cross-examination of an adverse witness); *Mangum v. State*, 274 Ga. 573(2), 555 S.E.2d 451 (2001).

(D) Lastly, as previously discussed, the suppressed evidence was material. Evidence generated by State officials characterizing Stripling as mentally retarded and questioning the only test result relied upon by the State at trial, compiled years before the KFC murders, would have refuted many of the State's arguments and in reasonable probability would have affected the outcome of Stripling's trial.

We therefore affirm the habeas court's finding with regard to the suppression of the parole file. Stripling must be retried on mental retardation and sentence. Because mental retardation must be determined separately, but may also have a bearing on sentencing and involve the same evidence, we direct that the retrial be bifurcated on these issues with mental retardation determined by the jury in the first phase of the trial.

2. Stripling raised the issue of mental retardation at trial, and the jury rejected it. This Court affirmed. *Stripling*, *supra*, 261 Ga. at 2(3), 401 S.E.2d 500. On habeas corpus, although the jury had rejected Stripling's claim of mental retardation, the habeas court found after reviewing the same trial evidence and some additional evidence offered during the habeas corpus proceedings that Stripling is mentally retarded and that there is "no credible evidence to the contrary, and therefore no basis for reasonable doubt about [Stripling's] mental condition." The habeas court ruled that Stripling's death sentence must be vacated because it was a "miscarriage of justice" and remanded the case to the trial court, not for retrial on sentence, but for the imposition of an "appropriate non-capital sentence."

This Court has authorized habeas courts to address habeas claims of mental retardation under the "miscarriage of justice" exception to procedural default when mental retardation was not raised at trial. See *Head v. Ferrell*, 274 Ga. 399(VI), 554 S.E.2d 155 (2001); *Turpin v. Hill*, 269 Ga. 302(3)(b), 498 S.E.2d 52 (1998). In other words, a habeas

petitioner who did not raise his alleged mental retardation at trial may do so on habeas corpus without regard to procedural default. *Id.* The justification for using "miscarriage of justice" in this context arises from Georgia's constitutional prohibition on the execution of mentally retarded criminals; it enables death-sentenced inmates who may possibly be mentally retarded to raise this claim for the first time when it would otherwise be defaulted.

However, "miscarriage of justice" does not authorize habeas courts to revisit jury verdicts on mental retardation and order different results.

> [Miscarriage of justice] is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is *not* guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry. [Cit.]

Gavin v. Vasquez, 261 Ga. 568, 569, 407 S.E.2d 756 (1991). It is "an extremely high standard and is very narrowly applied. [Cits.]" *Walker v. Penn*, 271 Ga. 609, 611(2), 523 S.E.2d 325 (1999). See also *Valenzuela v. Newsome*, 253 Ga. 793(4), 325 S.E.2d 370 (1985). "Miscarriage of justice" is primarily associated with its core purpose, i.e., to free the innocent who are wrongly convicted, and should rarely be used to overcome otherwise-valid procedural bars. See *id.* We therefore conclude that the habeas court erred by finding Stripling mentally retarded beyond a reasonable doubt and by ordering the imposition of a non-capital sentence. We reverse this portion of the habeas court's order. In accordance with our holding in Division 1, supra, a jury will determine whether Stripling is mentally retarded and whether he should be sentenced to death.

3. The habeas court also found OCGA § 17-7-131 unconstitutional to the extent that it requires a defendant claiming mental retardation to prove his alleged mental retardation at trial beyond a reasonable doubt.[5] This issue has already been decided adversely to Stripling. See *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003); see also *Mosher v. State*, 268 Ga. 555(4), 491 S.E.2d 348 (1997). OCGA § 17-7-131 is constitutional, and the portion of the habeas court's order to the contrary is reversed. On retrial, Stripling must bear the burden of proving his alleged mental retardation beyond a reasonable doubt. See *Head, supra.*

4. The habeas court found that the prosecutor had argued improperly in the guilt-innocence phase closing argument that Stripling would receive a life sentence if found to be mentally retarded by the jury.[6] See *State v. Patillo*, 262 Ga. 259, 417 S.E.2d 139 (1992) (jury should not be instructed in guilt-innocence phase that a mental retardation finding would preclude a death sentence). Although the *Patillo* opinion did not issue until after Stripling's direct appeal had been decided and was no longer in the pipeline, see *Taylor v. State*, 262 Ga. 584(3), 422 S.E.2d 430 (1992), the habeas court determined that the pipeline rule did not apply because *Patillo* announced a new rule of substantive, rather

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[5] Perhaps because the mental retardation statute was so new, Stripling incorrectly received permission from the trial court to argue in his closing statement in the guilt-innocence phase, and did so argue, that it was *the State* that had the burden to prove Stripling was not mentally retarded beyond a reasonable doubt. The prosecutor agreed and argued in his closing statement, "We have the burden of proof. We gladly accept it."

[6] Stripling did not object to this argument. In fact, the trial record shows that both parties argued to the jury in the guilt-innocence phase that a finding of mental retardation would result in a life sentence.

than procedural, criminal law. This finding by the habeas court was error. See *Luke v. Battle,* 275 Ga. 370, 372-373, 565 S.E.2d 816 (2002) (a new substantive rule of criminal law alters the meaning of a criminal statute to affect the prohibited conduct); *Harris v. State*, 273 Ga. 608(2), 543 S.E.2d 716 (2001). Because Stripling's direct appeal was no longer in the pipeline when *Patillo* announced a new procedural rule, its holding should not be applied retroactively to Stripling's case. See *id.*; see also *Teague v. Lane*, 489 U.S. 288(IV), 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The habeas court's ruling on Stripling's *Patillo* claim is reversed.

5. Based on our holding in Division 1 that Stripling must be retried as to mental retardation and sentencing, we need not address the warden's enumerations asserting error in the habeas court's finding of ineffective assistance of trial counsel as well as Stripling's remaining habeas claims. The habeas court found, and we affirm, that the evidence of Stripling's guilt was overwhelming and that his convictions are therefore unaffected.

Judgment affirmed in part and reversed in part.

All the Justices concur, except FLETCHER, C.J., SEARS, P.J., BENHAM, and CARLEY, JJ., who concur in part and dissent in part.

SEARS, Presiding Justice, concurring in part and dissenting in part.

I concur in the majority's ruling remanding this matter to the trial court for retrial on the issues of mental retardation and sentencing. For the reasons outlined in my dissent to *Head v. Hill*, S03A0559 (Oct. 2, 2003), however, I dissent to the majority's ruling requiring Stripling to establish his mental retardation in the trial court beyond a reasonable doubt.

I am authorized to state that Chief Justice FLETCHER and Justice BENHAM join in this dissent.

CARLEY, Justice, concurring in part and dissenting in part.

I concur in Divisions 2, 3 and 4, wherein the majority holds that the habeas corpus court erred in its findings that Stripling is mentally retarded beyond a reasonable doubt, that OCGA § 17-7-131 is unconstitutional and that our decision in *State v. Patillo*, 262 Ga. 259, 417 S.E.2d 139 (1992) should be given retroactive effect. However, I respectfully dissent to Division 1, which holds that Stripling is entitled to a new sentencing trial based upon the State's alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991), we affirmed Stripling's conviction and death sentence. Today's affirmance of the grant of habeas corpus relief notwithstanding our disposition of the direct appeal is completely dependent upon the majority's conclusion that "the record clearly establishes that [he] did not claim *Brady* error on direct appeal; he only claimed error under *Pope [v. State*, 256 Ga. 195, 212(22), 345 S.E.2d 831 (1986)]." Majority opinion, p. 9. Because the majority thereby mischaracterizes the scope of the issue actually resolved in Stripling's direct appeal, his *Brady* claim is procedurally barred and the habeas court erred in granting relief based thereon. " '(O)ne who had an issue decided adversely to him on direct appeal is precluded from relitigating that issue on habeas corpus, (cit.)....' [Cit.]" *Roulain v. Martin*, 266 Ga. 353-354(1), 466 S.E.2d 837 (1996).

In *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500, this Court addressed Stripling's claim regarding the disclosure of his records in possession of the Board of Pardons and Paroles, and held that "the non-disclosure provisions of OCGA § 42-9-53 must give way to the defendant's right of access to potentially mitigating evidence. [Cits.]" Contrary to the implication of today's opinion, Pope is not the only authority

cited for that holding. We also cited *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) as a decision which was in "accord" with *Pope*. *Ritchie*, as did *Pope*, dealt with records in the custody of a state agency which were protected from disclosure pursuant to statute. The only difference is that the records at issue in *Ritchie* were those of the Children and Youth Services, rather than the Board of Pardons and Paroles. In concluding that the constitutional rights of the defendant must take precedence over the Pennsylvania statute providing for confidentiality of the records, the Supreme Court of the United States held that "[it] is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.... *Brady v. Maryland*, *supra*, at 87, 83 S.Ct. 1194." *Pennsylvania v. Ritchie*, *supra* at 57(III)(B)(2), 107 S.Ct. 989. Thus, it is abundantly clear that *Ritchie* must be construed as a specific application of *Brady* in those circumstances involving allegedly exculpatory evidence which is possessed by a state agency and which is entitled to confidentiality under a state statute. Likewise, *Pope* is also a *Brady* case, holding that a criminal defendant in Georgia is entitled to exculpatory evidence held by the Board of Pardons and Paroles, notwithstanding OCGA § 42-9-53. Confidentiality in those records does "not outweigh a capital defendant's need for access to potentially mitigating evidence. [Cit.]" *Pope v. State*, *supra* at 212(22), 345 S.E.2d 831.

Accordingly, the majority incorrectly concludes that Stripling's direct appeal dealt only with a *Pope* claim which did not implicate *Brady*. Indeed, *Pope* is itself a *Brady* case, even though that decision was not cited therein. According to the majority's analysis, no constitutional issue, such as those raised pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) or *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), is ever

conclusively resolved on direct appeal. Consequently such contentions can be relitigated by a habeas court, unless, in rejecting the defendant's claim of error, the appellate court expressly cited the relevant seminal decision of the Supreme Court of the United States. The fallacy in such a narrow construction of appellate decisions is apparent. Substance, not the citation of authority, is the controlling factor in determining the legal scope and effect of a holding. Thus, the lack of an express citation to *Brady* in either *Pope* or *Stripling* is immaterial. In substance, both appeals address *Brady* issues. Moreover, the specific citation in *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500, to *Ritchie* is additional proof that, in resolving the claim regarding records held by the Board of Pardons and Paroles, this Court was relying upon the rationale of *Brady*. Because *Ritchie* is clearly a *Brady* case, so too is *Stripling* by necessary implication.

The majority seeks to justify its narrow construction of the holding in *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500, by stating that Stripling could not have raised a *Brady* error in his direct appeal, "because [he] did not know what was contained in the parole file and thus could only have speculated about the withheld material." Majority opinion, p. 126. However, this conclusion betrays a fundamental misunderstanding of *Brady*. Under that decision, Stripling's "interest (as well as that of [the State]) in insuring a fair trial can be protected fully by requiring that the ... files be submitted only to the trial court for an in camera review." *Pennsylvania v. Ritchie*, *supra* at 60(III)(C), 107 S.Ct. 989. That is precisely the procedure which was followed in *Stripling*. "The trial court reviewed [his] parole file and determined there was no potentially mitigating evidence in the file not already known to and available to the defendant." *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500. Consistent with the applicable procedure for assessing the trial court's ruling, this Court conducted its own review of the records on appeal, and

found "no error in the non-disclosure of the defendant's parole file. [Cit.]" *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500.

Thus, Stripling did assert a *Brady* violation in his direct appeal, and this Court rejected it. The fact that, on habeas, Stripling has now identified material in the records which he contends is exculpatory does not show the existence of a viable claim of *Brady* error. Instead, his argument in that regard constitutes an unauthorized attempt to relitigate this Court's previous holding that the records do not contain any beneficial material which was not otherwise known and available to the defense. "Claims that were previously litigated and decided on direct appeal are barred because it is well-settled that '(a)fter an appellate review the same issue( ) will not be reviewed on habeas corpus.' [Cits.]" *Turpin v. Mobley*, 269 Ga. 635, 636(1), 502 S.E.2d 458 (1998). The majority concludes that Stripling can readvance his previously rejected assertion because this Court's holding in *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500, that the mitigating evidence was merely cumulative "was based on an incorrect reading of the record" and is subject to our "inherent discretionary power to review and correct [our] own errors." Majority opinion, p. 127. Whatever the permissible scope of this Court's authority to correct its own errors, however, it certainly does not extend to relitigating in the context of habeas corpus issues which were previously decided on direct appeal.

> The "law of the case" doctrine is not confined to civil cases, but applies also to rulings made by appellate courts in criminal cases. [Cit.] Thus, in this civil action, the habeas court, as well as this Court, would certainly be bound by the ruling in [*Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500], regardless of whether that ruling may be erroneous. [Cits.]

Roulain v. Martin, *supra* at 354(1), 466 S.E.2d 837. See also *Turpin v. Mobley*, *supra* at 636(1), 502 S.E.2d 458; *Gaither v. Gibby*, 267 Ga. 96, 97(2), 475 S.E.2d 603 (1996); *Davis v. Thomas*, 261 Ga. 687, 689(2), 410 S.E.2d 110 (1991); *Gunter v. Hickman*, 256 Ga. 315, 316(1), 348 S.E.2d 644 (1986); *Elrod v. Ault*, 231 Ga. 750, 204 S.E.2d 176 (1974). Compare *Brown v. Francis*, 254 Ga. 83, 86(3), 326 S.E.2d 735 (1985) (jurisdiction to consider new grounds not previously asserted in original habeas petition). If, as the majority holds, this Court is entitled to correct perceived errors in *Stripling v. State*, *supra*, then the long-standing "law of the case" rule is no longer in effect in this state, and a habeas court is free to redetermine and reverse any of our previous rulings made in a petitioner's direct appeal. In effect, the habeas court now becomes a forum for appellate review of this Court's prior disposition of the very same case.

Division 1 of today's opinion begins with a misconstruction of the holding in *Stripling v. State*, *supra* at 6(7), 401 S.E.2d 500, as addressing something other than an alleged *Brady* error, and concludes with a wholesale rejection of the "law of the case" principle. Application of the correct analysis compels the conclusion that this Court disposed of the merits of Stripling's *Brady* claim in the direct appeal, and neither the habeas court nor this Court is now authorized to second-guess that disposition. Accordingly, the grant of habeas relief on that ground was erroneous and should be reversed.

SUPREME COURT OF GEORGIA

Case No. S03A0525.

Atlanta November 26, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

FREDERICK HEAD, Warden v. ALPHONSO STRIPLING

Upon consideration of Appellant's Motion for Reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Carley, J., who dissents.

It is further ordered that Appellee's Motion for Reconsideration is denied. All the Justices concur, except Fletcher, C.J., Sears, P.J., and Benham, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ LYNNE M. STRICKCOMB
Chief Deputy Clerk

SUPREME COURT OF GEORGIA

Case No. S03A0525.

Atlanta November 26, 2003

The Honorable Supreme Court met pursuant to adjournment. The following order was passed

FREDERICK HEAD, Warden v. ALPHONSO STRIPLING

It is ordered that this Court's judgment of October 14, 2003, be amended to show Carley, J., concurring in part and dissenting in part rather than concurring.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/S/ LYNNE M. STRICKCOMB
Chief Deputy Clerk

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

ALPHONSO STRIPLING, *Petitioner*,

vs.

FREDRICK HEAD, Warden, Georgia Diagnostic and Classification Prision, *Respondent*.

Civil Action
#95-V-320

STATEMENT OF THE COURT

Alphonso Stripling was arrested for the offenses of two counts of murder, two counts of armed robbery and two counts of aggravated assault on October 16, 1988. October 31, 1989 he was indicted by the Grand Jury and was set for trial which began with motions on March 9, 1989. It became immediately clear that there was no question about the guilt or innocence of Stripling; he had committed these heinous offenses. It was also clear that he had a history of mental retardation, the extent of which was unclear to the defense counsel in the case but would become the crucial issue at trial. Stripling's mental retardation became an issue because the Georgia Legislature had passed in 1988, O.C.G.A. §17-7-131 declaring that a felon who is mentally retarded could not be executed. The statute required the defendant to establish his mental retardation beyond a reasonable doubt.

In considering the petition in this case the Court has reviewed the evidence presented at trial, several affidavits, and evidence presented at hearings reviewing the mental state of the defendant years prior to the date of the offense from grade school years up to the time of the offense and to the present. The Court believes the evidence in this case has established beyond a reasonable doubt that Alphonso Stripling is mentally retarded, the evidence of which is detailed in the attached order. The Court therefore finds that he cannot be

executed because to do so would violate Georgia law as well as the recently decided United States Supreme Court case of *Atkins vs. Virginia,* 122 U.S. 2242 (2002). Therefore, based on his mental condition, the Court sets aside his death penalty sentence and orders that he be sentenced to life without parole.

This Court also considered the conduct of the trial in this case. The Petitioner has asserted two major points of conduct in the course of this trial that deprived the defendant of a fair trial due to ineffective assistance of counsel.

The Petitioner has alleged first, an important piece of evidence was withheld from Petitioner's counsel by order of the trial court. Mental health records were in the possession of the Department of Corrections and the Georgia Board of Pardons and Paroles which revealed significant evidence of the mentally retarded condition of the Petitioner. The trial Court considered the Petitioner's request but refused to release those documents to defense counsel, arguing that though the records were "exculpatory" they were only "cumulative" and therefore, the trial Court would not release it to the defense.

Further, the Petitioner alleged that the defense counsel did not seek the important school records back through his grade school years. These records indicated a continuing significant history of mental retardation of the Petitioner from grade and high school through maturity. Such evidence would clearly demonstrate his mentally retarded condition, and since trial counsel rendered ineffective assistance by failing to acquire such evidence by making an appropriate investigation.

The Petitioner is correct. The Petitioner was deprived of his right to due process by the deprivation of these important records which clearly showed and supported the Petitioner's assertion that he was in fact retarded. The trial Court's failure

to disclose the Pardon & Parole records coupled with trial counsels failure to obtain important school records deprived Petitioner of due process. At the least, Petitioner is entitled to a reconsideration of sentence.

The Petitioner also has asserted certain problems with the Georgia statute itself dealing with mental retardation. Georgia, in 1988 adopted the new statute barring execution of the mentally retarded. But in the process, the statute placed the burden of proof on the defendant to prove mental retardation beyond a reasonable doubt. No other Georgia law imposes such a heavy burden upon the defense. Further, no other state which bars execution of the mentally retarded imposes this burden on a defendant. In view of the Constitutional nature of the prohibition against executing the mentally retarded recently announced in *Atkins v. Virginia* to impose such a heavy burden on the defendant would violate procedural due process. Therefore, on this ground the case should be remanded with direction to consider the Petitioner's burden to establish mental retardation by preponderance of the evidence which is consistent with prior rulings of the Georgia courts before the adoption of the statute and the present decision of the United States Supreme Court.

It should be noted that Mr. Stripling is in fact guilty of all the crimes he is alleged to have committed, and he should be exposed to the highest possible sanction under the laws of the State of Georgia. Georgia in its mercy has decided and, as supported by the recent action of the United States Supreme Court, that execution of the mentally ill violates Georgia law and the United States Constitution. Therefore, Mr. Stripling will serve the next highest sanction that can be imposed, life without parole.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ALPHONSO STRIPLING, *Petitioner*,

vs.

FREDRICK HEAD, Warden, Georgia Diagnostic and Classification Prison, *Respondent*.

CIVIL ACTION
No. 95-V-320

HABEAS CORPUS

ORDER

Having duly considered Petitioner's original and amended Petition for Writ of Habeas Corpus relating to Petitioner's challenge to the convictions and sentences entered in the Superior Court of Douglas County, Georgia, in Criminal Action No, CR88-1091, as well as all relevant portions of the record therein, including the competency proceedings; and having considered all filings in the instant proceeding, including the post-hearing briefs filed on behalf of both parties; the Court hereby enters the following Findings of Fact and Conclusions of Law in accordance with O.C.G.A. § 9-14-49.

PROCEDURAL HISTORY

Petitioner was arrested for events occurring on October 16, 1988, where a Kentucky Fried Chicken store in Douglasville, Georgia had been robbed. During the robbery two men were killed and two others were wounded. On October 31, 1988, after special presentment to the Grand Jury, Petitioner was indicted for two counts of murder, two counts of armed robbery and two counts of aggravated assault. R.O.A. 4. Alden Snead, the Douglas County Public Defender, was appointed to represent Petitioner and filed a number of pre-trial motions on his behalf. Thereafter, on February 1, 1989, John

Beall and Michael Hauptman entered their appearance on Petitioner's behalf and the Public Defender withdrew. R.O.A. 367. New counsel filed amendments to the motions already filed and some new motions. On March 9, 1989, a motions hearing was conducted where the trial court addressed all of the motions and amendments thereto. On March 30, 1989, the trial court heard evidence on a challenge to the composition of the Grand Jury which was ultimately denied. On April 20, 1989, the trail court heard evidence and argument on defense counsel's request for disclosure of Petitioner's records from the Georgia Department of Corrections and the Georgia Board of Pardons and Paroles. Also considered at that hearing was defense counsel's request for disclosure of the Parole Records of Petitioner's father and brother. Also during this hearing the trial court suggested that trial counsel retain Dr. Boaz Harris, M.D. as their expert witness. (4/20/89 P.T. at 24).

Thereafter, on June 16, 1989, three days before the start of Petitioner' trial on the issue of competency, the trial court announced that it had not yet done the *in camera* inspection of the district attorney's files and revealed that the Parole files had not yet been sent to the Court. At that hearing the court addressed preliminary trial matters and trial counsel announced that his expert found Petitioner to be mentally retarded.

On June 19, 1989, Petitioner's trial on the issue of competence began. Jury selection and the taking of evidence took less than two days and on June 20, 1989, the jury returned its verdict finding that Petitioner was not incompetent to stand trial. R.O.A. 573. Immediately thereafter, on June 21, 1989, jury selection for Petitioner's capital trial began. At the guilt/innocence phase of the trial, the state presented overwhelming evidence of Petitioner's guilt. Petitioner presented evidence to support verdicts of Guilty But Mentally Ill and

Guilty But Mentally Retarded.[1] The jury rejected the defenses and convicted Petitioner on all counts. R.O.A. 592. Thereafter, the sentencing phase of Petitioner's trial took place and the jury sentenced Petitioner to death for the murders.

Petitioner filed a motion for new trial which was eventually amended. R.O.A. 612; 629. After an evidentiary hearing on the issues raised in the Amended Motion for New Trial, the trial court denied relief. Thereafter, Petitioner timely filed his notice of appeal to the Georgia Supreme Court. R.O.A. 1. The Supreme Court affirmed Petitioner's convictions and sentences. Petitioner filed a Petition for Writ of Certiorari which was denied on December 2, 1991. Thereafter Petitioner filed his Petition for Writ of Habeas Corpus in the Superior Court of Butts County and the Respondent filed his Return and Answer. Petitioner amended his original Petition and Respondent again answered. The Court held a status conference and specifically directed the parties to address the issue of the constitutionality of Georgia's requirement that the defendant prove his mental retardation beyond a reasonable doubt. Both parties filed briefs on that issue. The Court thereafter held an evidentiary hearing on April 2, 3, and 4 where Petitioner and Respondent presented documentary evidence, affidavits, depositions, and live testimony. On June 28, 2002 Petitioner timely filed his Post-Hearing Brief, as did Respondent on August 12, 2002. Petitioner timely filed his Reply Brief on September 12, 2002.

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[1] Defense counsel originally requested a charge on Not Guilty By Reason Of Insanity, but upon the defense experts testifying Petitioner knew the difference between right and wrong, the trial Court refused to give such an instruction.

PETITIONER'S CLAIMS

I. Whether Petitioner's Death Sentence Must Be Vacated as a Miscarriage of Justice Because He Is Mentally Retarded

In Claim I of his Amended Petition for Writ of Habeas Corpus, Petitioner asserts that because "he is mentally retarded" he is "ineligible for the death penalty." For the reasons stated in the Court's Conclusions of Law on this subject, the Court finds that this claim is properly before the Court.

A. Findings of Fact

The Court makes the following specific findings of fact in addition to those findings discussed below:

* Petitioner has demonstrated a consistent pattern of reliable IQ scores, gathered during a thirty year period, that fall within the mentally retarded range;

* Petitioner's IQ falls within the range of mild mental retardation which indicates he has significantly subaverage general intellectual functioning;

* Petitioner's significantly subaverage general intellectual functioning has resulted in or is associated with deficits in adaptive behavior;

* These conditions manifested themselves during the Petitioner's developmental period;

* Petitioner is mentally retarded; and

•• There is no credible evidence to the contrary, and therefore no basis for reasonable doubt about Petitioner's mental retardation.

1. Evidence In Support of Mental Retardation Presented At Trial[2]

In support of his claim of mental retardation at trial Petitioner presented the testimony of Dr. John Kiehlbach, Ph.D., Dr. Boaz Harris, M.D., and Sallie Stripling, Petitioner's mother. Dr. Harris, a psychiatrist, testified primarily to his diagnosis that Petitioner suffered from schizophrenia. Dr. Harris concurred with Dr. Kielhbach's diagnosis that Petitioner was mentally retarded. (Tr. 1969-70). Dr. Kiehlbach, a psychologist, administered a series of tests to Petitioner, one of which, the Wechsler Adult Intelligence Scales, Revised (WAIS-R), measured Petitioner's intelligence. On that test, Petitioner obtained an IQ score of 64. (Tr. 1828). Dr. Kiehlbach testified at trial about the testing that he conducted. He further elaborated that the results of the WAIS-R indicated that Petitioner is mildly mentally retarded. *Id.* In fact, Dr. Kiehlbach testified that IQ test scores are "the only criteria" for determining mental retardation. (Tr. 1885).[3]

Ms. Sallie Stripling was the only other defense witness who offered testimony concerning Petitioner's mental retardation. Out of 50 pages of transcript only one page of Ms. Stripling's testimony had any relation to mental retardation and merely covers the facts that Petitioner did poorly in

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[2] In order for Petitioner to invoke the miscarriage of justice exception to the doctrine of *res judicata*, Petitioner must come forth with new, reliable evidence that was not presented at trial. *See* Section B(1), *infra*. Thus, the Court will briefly outline the relevant testimony on the issue of mental retardation that was presented at trial.

[3] Dr. Keilbach conceded on cross-examination that his earlier testimony was in error and that deficits in adaptive behavior and manifestation during the developmental factors are necessary criterial for a diagnosis of mental retardation under DSM-III and the Georgia statute. (Tr. 1914).

school and that other kids teased him for being slow. (Tr. 1769-70).[4] The remainder of her testimony related to the abuse she and her children suffered at the hands of her ex-husband and that the children also witnessed her husband physically abusing her.

At trial, Petitioner also admitted into evidence prison records from two prior incarcerations.[5] *See* Defendant's Exhibits 1 and 2 (Tr. 2047-2090; 2091-2178). Both Dr. Keihlbach and Dr. Harris testified that they reviewed the prison records

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[4] Here entire testimony concerning retardation was as follows:

Q: Did "phon" do well in school?
A: No, Sir.
Q: Did he ever do well in school?
A: No.
Q: How was he treated by the other children?
A: They would tease him.
Q: Why?
A: Because he didn't act like the other children.
Q: Did they have a nickname for him?
A: They call him – he was fat at the time, and he had a scar on his face, and they used to tease him about that.
Q: They ever call him slow?
A. Yes, sir.
Q: What did they mean by that, if you know, ma'am?
A: That he couldn't learn.

[5] These prison records are not to be confused with the *Parole* records Petitioner submitted to this Court as Exhibit 2. While some of the prison records admitted at trial are contained in the Parole records, they are not the same and the Parole records contain evidence supporting Petitioner's mental retardation claim that was not contained in the prison records.

and highlighted certain areas that they believed supported a diagnosis of mental retardation. For instance, the records revealed that when Petitioner was 17 and incarcerated at Alto prison, he was administered a Peabody Picture IQ test[6] on which he scored 68. (Tr. 2052). In addition, the prison records contained scores from a Wide Range Achievement Test (WRAT) which was also administered when Petitioner was 17 years old. The results of that testing indicated that while Petitioner was 17 years and 8 months old, he was only operating at the second grade level in reading and math, and the third grade level in spelling. (Tr. 2052). Also contained in the prison records was a report which indicated Petitioner scored a 111 on a "Culture Fair" test administered to him at the Georgia Diagnostic and Classification Center in 1980. (Tr. 2093). Further reflected in the records are WRAT scores obtained at the same time which indicate that Petitioner, at 23 years and 3 months, was operating at the fourth grade level in reading and math, and the second grade level in spelling. I.D.

Lastly, trial counsel presented Petitioner's high school records which contained grades from two school years, 1971-72 and 1972-73. The grades were almost all D's and F's and the records indicated that Petitioner "transferred to another school" in 1973.[7] (Tr. 2186-88).

In rebuttal, the State presented the testimony of Dr. Martin Youngleson, Kathleen Porter, Ronald Shadix, Becky

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[6] Dr. Harris erroneously testified that the Peabody IQ test was a written examination. (Tr. 2191). The Peabody IQ test is a non-verbal test that employs 175 picture plates, each with 4 pictures. The test administrator says a word and the test taker is to signal which picture is most like the stimulus word. (Lezak, *Neurological Assessment*, Third Edition, Oxford University Press, 1995, at 542).

[7] In fact, Petitioner dropped out of school in 1973.

Brown and Sheriff Earl Lee. Ms. Porter was the bank-teller victim in a prior armed robbery for which Petitioner had been convicted. At the time of Petitioner's trial Ms. Porter could not identify Petitioner as the person who had robbed her. (Tr. 2281). She did testify that the person who robbed her handed her a demand note which read "give me your hundreds and fifties, I have a gun." (Tr. 2280). The man handed her a small bag in which she put the money. After she gave the man the money, he left the bank. (Tr. 2281).

Ronald Shadix was a captain with the Douglas County Sheriffs Department who testified that when he attempted to speak with Petitioner's mother about the case, she declined to talk with him. In addition, he testified about his contacts with Petitioner, which were limited to a short time in his office where he allowed Petitioner to use the telephone.[8] On one occasion, Mr. Shadix dialed the phone for Petitioner and on two other occasions Petitioner dialed the phone himself. (Tr. 2350-52). Mr. Shadix testified that in his limited contact with Petitioner he had no problems communicating and that Petitioner did not appear out of the ordinary. (Tr. 2353).

Rebecca Brown, who was an employee of C&S Bank in 1980, testified about witnessing an armed robbery to which Petitioner had pleaded guilty. Ms. Brown described how three black males came into the bank and how one of them jumped the teller window and went behind the teller cages. Ms. Brown identified State's exhibit 94 (a photo of Petitioner) as the man who came into the bank unarmed and told

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[8] Mr. Shadix also indicated he was able to observe Petitioner while Petitioner spoke with Sheriff Lee. Mr. Shadix's testimony does not indicate whether he actually had any contact with Petitioner or whether he merely was able to observe the events. Nevertheless, his testimony was that he did not observe any odd behavior by Petitioner in the short time he was observing him. (Tr. 2353).

her to get onto the floor. (Tr. 2360-61). Ms. Brown never made an in-court identification of Petitioner.

Sheriff Earl Lee also testified for the State in rebuttal. The totality of his testimony was that in the time Petitioner had been in his custody he had not observed Petitioner "sitting with his head down looking at the floor." (Tr. 2366-67).

Dr. Martin Youngleson, a psychologist, testified at trial concerning Petitioner's mental retardation. In his trial testimony, Dr. Youngleson stated that he did not administer psychological or intelligence testing to Petitioner in large part[9] because he had recently been administered an IQ test by Dr. Kiehlbach which led him to believe that Petitioner would score higher if given the same test in such a short period of time. (Tr. 2303-04). However, he opined that Petitioner was not mentally retarded based upon the reported 111 on the Culture Fair (Tr. 2329), and his "guestimate" (Tr. 2298) that Petitioner was of average intelligence, "somewhere between, about, with an IQ of 95 and 105" (Tr. 2312).[10] Dr. Youngleson also opined that Petitioner was not mentally retarded because he was not suffering from deficits in adaptive behavior.[11] This opinion was based on the fact that Petitioner

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[9] Dr. Youngleson also testified that he did not administer any IQ tests to Petitioner because Petitioner was depressed, and had a history of substance abuse. Tr. 2304-05.

[10] Although Dr. Youngleson did believe Petitioner may have been malingering, his testimony reveals that the Doctor believed any malingering was directed toward making "himself appear to be more mentally ill" rather than mentally retarded. (Tr. 2315). In fact, Dr. Youngleson testified that he believed the results from the WAIS-R administered by Dr. Keihlbauch were valid. (Tr. 2327).

[11] While Dr. Youngelson testified that Petitioner "was able to give me a history of how he had adapted well in a number of environments" (Tr. 2307), this was merely a conclusory statement that was

was able to drive a car[12] and work as a cook at Kentucky Fried Chicken.[13] (Tr. 2301-02).

2. New Evidence Of Mental Retardation Presented In These Proceedings

In the proceedings before this Court Petitioner has presented voluminous new evidence that was not presented at trial to support his claim of mental retardation. This evidence, individually, as well as cumulatively, leads this Court

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never backed up with specific examples. Thus, there is no evidence in the trial record to support this testimony.

[12] The Court notes that Dr. Youngelson's premise is flawed as people with mild mental retardation are able to obtain their driver's license. In fact, anti-discrimination laws mandate that states make provisions to allow people with mild mental retardation an opportunity to obtain their driver's license. As Professor Luckasson noted during testimony before this Court:

> Under the Anti-discrimination Federal Legislation and often state legislation, the State Motor Vehicle Departments need to be accessible and their assessments should be accessible to people who have disabilities so that qualified people with disabilities can take the test and perhaps get a driver's license. It is also frequently a very desired objective for people who have disabilities because it is such a marker of adulthood and independence, so some people are really highly motivated to do that.

(H.T. 93).

[13] Again, this justification proves illusory as people with mild mental retardation are fully capable of working in the fast food industry, a fact admitted by Dr. Youngleson in his deposition testimony before this Court. H.T. 1332; *See also*, H.T. 731-734, Affidavit of Tina Taylor, M.S.W. ("None of the work required of a cook at Kentucky Fried Chicken is difficult or complicated. Instead, a person of borderline or impaired intelligence can quickly learn the tasks.").

to conclude beyond a reasonable doubt that Petitioner is as a matter of fact mentally retarded, and that as a matter of law his execution would be a miscarriage of justice.

a. Parole Records

Initially, the Parole records contain reference to an IQ test administered by the Georgia Department of Corrections when Petitioner was 16 years old. Although the name of the test is not disclosed, the records reveal that Petitioner obtained an IQ score of 67 on the test. H.T. 517. While this score alone is insufficient to diagnose Petitioner with mental retardation, it is an important corroborating fact that could and should have been presented at trial. This score, obtained on a test administered by Department of Corrections officials, falls well within the range of "significant subaverage intellectual functioning" as defined in O.C.G.A. §17-7-131 and DSM-III, DSM-III-R, and DSM-IV. This test result cannot be attributed to a sympathetic, defense oriented doctor desiring to obtain a low score. Similarly, this score cannot be attributed to affirmative efforts by Petitioner to score poorly because (as the state argued at trial) Petitioner was "staring down the barrel of the electric chair." (*See e.g.*, Tr. 2453). This test was administered when Petitioner was not facing a potential death sentence and was not suffering from depression because his girlfriend had just revealed to him that the baby she bore was not his (all reasons argued by the State to discount the 64 Petitioner scored on the WAIS-R in evidence at trial).

In addition, the Parole records contain numerous documents in which Department of Corrections and Board of Pardons and Paroles employees conclude that Petitioner is, in fact, mentally retarded. H.T. 543. Moreover, the Parole records also contain documents that call into question the va-

lidity of the Culture Fair score of 111[14] which was and is the only (purported) IQ score in Petitioner's history that falls outside the range for mental retardation. H.T. 517. Lastly, the Parole records contain various references to instances where Ms. Sallie Stripling, well before her son was facing the electric chair, reported to state officials that her son was mentally retarded. H.T. 517, 540.

Thus, the Parole records, had they been disclosed to trial counsel, would have provided compelling evidence that was not available from other sources in support of Petitioner's claim for mental retardation. Further, the records would have provided trial counsel with ample ammunition to refute the majority of the State's case in rebuttal.

The Court notes that Respondent attempted to demonstrate that the Parole records also contained information damaging to Petitioner's mental retardation claim. Therefore, Respondent's argument goes, the Parole records do not completely support a claim of mental retardation. Specifically, Respondent cited to an entry in the records which appears to indicate that Petitioner obtained a G.E.D. while in prison. The Court finds as a matter of fact, and based on the experts' testimony regarding Petitioner's mental abilities and Petitioner's Exhibit 60 (stating that the Department of Education has no G.E.D. on file for Petitioner), that Petitioner did not obtain a G.E.D. while in prison, and that the entry was in error.

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[14] Trial counsel, Mr. Hauptman, testified in deposition that he had no idea what the Culture Fair was and therefore had no idea how to combat it. Mr. Beall, the other trial counsel, testified that he believed that failing to obtain evidence to refute the Culture Fair score was a critical deficiency in the defense of Petitioner.

b. Elementary School Records

At trial, counsel requested school records from the City of Atlanta School System where the majority of Petitioner's educational career took place.[15] The records obtained at trial contained no reference to any intelligence testing. The records obtained by current counsel for Petitioner, and admitted into evidence as Petitioner's Exhibit 1, not only contain such references, but also contain a wealth of other information relevant to Petitioner's claim of mental retardation.

Petitioner's Exhibit 1 contains two IQ scores on California Achievement tests administered when Petitioner was in third and fifth grades. While these IQ scores are merely "IQ equivalent" and are insufficient for diagnosing mental retardation standing alone, the scores are relevant in that they tend to corroborate diagnostic IQ testing and to establish Petitioner's intelligence level in childhood. H.T. 109-110. In particular, Petitioner's Exhibit 1 shows that in April of 1967, when Petitioner was 9 years old and in third grade, he scored a full scale IQ 64 on the California Achievement Test. Then, two years later in March of 1969, Petitioner obtained a full scale IQ score of 52 on a similar test. (H.T. 474). In addition, these records indicate that Petitioner, throughout his academic career, always operated below grade level and consistently received poor grades. (*See generally*, H.T. 470-78).

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[15] There is some discrepancy over whether trial counsel requested all of Petitioner's school records or merely his high school records. Whether counsel asked for all or some of the records is irrelevant for purposes of evaluating the substantive issue of mental retardation under the miscarriage of justice exception. The fact remains that, for whatever reason, the elementary school records were not produced at trial and constitute new evidence before this Court.

c. Testimony From Teachers

No testimony was presented at trial from any of Petitioner's teachers.[16] However, some of Petitioner's teachers were available at the time and possessed highly relevant information pertaining to Petitioner's intellectual functioning.

i. Carolyn Baisden

Ms. Baisden taught Petitioner in third grade, the 1966-67 school year. H.T. 474. She recalls that "he was extremely slow academically" and "he had problems retaining information." (H.T. 3008). When interpreting Petitioner's elementary school records (Petitioner's Exhibit 1), Ms. Baisden noted that while Petitioner was in third grade, he was reading the first grade reader, second level. (H.T. 3010). Further, the records indicate that even "satisfactory" grades from Ms. Baisden did not mean that Petitioner was achieving on par. In fact, Ms. Baisden testified that the "satisfactory" grades only meant that Petitioner was improving and even then only on the individualized curriculum that was specifically outlined for him. (H.T. 3010-11). A succinct and revealing interpretation of the school records is found in the affidavit[17] testimony of Ms. Baisden where she related:

> though his 5th grade scores show several B's and many checks, the performance grid shows that he was frequently working below grade level. There are a few instances in which the grid shows Alphonso having reached

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[16] Trial counsel testified that he never interviewed Petitioner's teachers because he "didn't see it as necessary." (H.T. 1191). Again, the reason this information was not before the jury is immaterial in the analysis of this Claim. The fact remains that this important testimony supporting a claim of mental retardation was never presented at trial.

[17] Ms. Baisden also testified via deposition.

> the "on" grade level mark, but it is important to remember that Alphonso was probably in the lowest group for all academic subjects (as he was in my class). If he achieved on grade level in any subject area, it was probably the result of teacher assisted tasks and tutoring. The grades I gave Alphonso the year he was with me were based on below grade level instruction because I knew Alphonso was low functioning, and he was graded according to his ability rather than on a comparative, competitive basis. The satisfactory marks he received were given in the general context of his potential, which I knew to be lower than the other children's. In other words, he was working satisfactorily for his ability. This way of grading, which has come to be known as social promotion, is a way of keeping slower children in classes with their peers, even though they are not performing on grade level. Social promotion was a means by which we could avoid labeling children.

(H.T. 737). Although Ms. Baisden later testified that there was no official school policy of social promotion, she described a system where:

* students were not taught on a grade level but in accordance with the student's own limitations;
* students were taught in an "ungraded curriculum;" and
* once the student was "promoted – placed in the next grade" the "teacher who had him would work with him on that lower level, not on the grade level he was actually in."

(H.T. 3010-11). This Court finds as a matter of fact that the system Ms. Baisden described, while not officially labeled as "social promotion," is the functional equivalent. The Court therefore finds no discrepancy between her affidavit testimony and her deposition testimony.

ii. Eoline Sessoms

Ms. Sessoms submitted her testimony via affidavit. She indicated that she taught Petitioner in kindergarten. She recalls Petitioner as being an obedient student who tried hard but could not grasp the simplest concepts because "he was slow and he had to be told things again and again." (H.T. 739). Although she hoped that Petitioner's "slowness was something that would pass," it became evident it would not and Ms. Sessoms taught him at his own level rather than on grade level. (H.T. 740). Ms. Sessoms further described how if children like Petitioner could not learn like the others, she would focus them on things that they could do, like coloring. As a result, she recalls that Petitioner did a lot of coloring while in her class because he could not learn. *Id.* In cases where the child could not learn, Ms. Sessoms described her role as kissing them and sending them along because "there was no reason to hold him back" because "there would be nothing more [she] could do for him the next year and [she] didn't want to add the stigma of being kept behind." (H.T. 740-41).

iii. Martha Cleveland

Ms. Cleveland taught Petitioner in First Grade and noted that he was always in the lowest reading group because he "struggled to read at all." (H.T. 743). Ms. Cleveland described Petitioner as having trouble mastering even the simplest of tasks – shaping letters. Petitioner's developmental limitations were so pronounced that Ms. Cleveland had to allow Petitioner to copy the forms of letters from ones that she had drawn. Ms. Cleveland also described her grading system as having the function of highlighting the differences between children so that their problem areas could be addressed. (H.T. 743-44). Because of this, she recalls she "rarely, if ever gave F's because the idea was not to emphasize the children's failure but to highlight their difficulties for future action." (H.T. 744). Thus, although Petitioner was

functioning in "the extremely low end of his age group and [was] in need of [] special attention . . . there was no provision" for special education. ID.[18]

The Court notes that the testimony of Petitioner's former teachers alone is not sufficient for a finding of mental retardation. However, the Court also finds that the evidence provided by these education professionals gives tremendous insight into Petitioner's development (or lack thereof) throughout a portion of the developmental period. Further, the observations of these trained professionals that Petitioner was slow and exhibited such developmental delay from early childhood is powerful evidence that Petitioner was not malingering when given the battery of tests by defense experts in 1989 and 1995. The Court specifically finds both affidavit and deposition testimony of the teachers to be credible. Further, the Court finds that the practice of "social promotion," while not labeled as such by the Atlanta City School system, was at least *de facto* in existence during Petitioner's elementary school education. Finally, this Court finds as a matter of fact that Petitioner was promoted from at least grades kindergarten through fourth grades based on what has now become known as social promotion.

d. Evidence Completely Discrediting The Culture Fair Score

As noted, the prison records introduced by defense counsel at trial contained a reference to Petitioner obtaining a 111 on a "Culture Fair" test while at Georgia Diagnostic and Classification Prison in 1980. Dr. Youngelson testified that

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[18] Ms. Cleveland, like Ms. Sessoms and Ms. Baisden, describes a *de facto* social promotion policy where the teachers in Petitioner's school merely passed children on even though they were operating below grade level, "because there was no other reason not to." H.T 743.

he considered this score in concluding that Petitioner was not mentally retarded. (Tr. 2329). Further, the prosecutor relied on this score to argue to the jury that Petitioner was not mentally retarded. (Tr. 2472). At trial, this 111 was the only objective evidence indicating that Petitioner did not suffer from significant subaverage intellectual functioning. In the proceedings before this Court, Petitioner has provided compelling evidence which indicates the 111 on the Culture Fair is wholly unreliable and worthless as an indicator of intellectual functioning. After hearing this evidence and testimony, this Court finds as a matter of fact that the Culture Fair test administered to Petitioner in 1980 is of absolutely no worth in assessing intellectual functioning and provides no basis to conclude that Petitioner is not mentally retarded.

Petitioner presented both affidavit and live testimony from Dr. Herbert Eber in proceedings before this Court. Dr. Eber is a licensed psychologist in Georgia and Arizona. From 1973 to 1991, Dr. Eber designed and managed the Correctional Diagnostic System for the Georgia Department of Corrections, where he established and supervised the psychological testing performed on inmates entering the prison system in Georgia. H.T. 716-17. Dr. Eber testified that the testing protocol called for incoming inmates to be administered a Culture Fair test. Further, Dr. Eber testified how he, as the person who designed the diagnostic testing protocol, modified the Culture Fair test that was given to Mr. Stripling. Based on his experience as the manager of the diagnostic system, Dr. Eber testified that any scores on the Culture Fair test administered to Mr. Stripling are invalid, inaccurate and simply "wrong" as a measure of IQ. *See, e.g*, H.T. 55; 721. Dr. Eber reached this conclusion for a number of reasons including:

> (1) The Culture Fair in any form is not one of the tests accepted by the DSM for diagnosing mental retardation, H.T. 55;

(2) The Culture Fair was not individually administered, H.T. 54-55;

(3) The Culture Fair was not administered by a trained psychologist, H.T. 55;

(4) The Culture Fair does not take into account reading skills, a necessary component of intelligence, H.T. 719-20;

(5) The Culture Fair that was administered to Petitioner was not given with time limits, a modification which was specifically condemned by the test manufacturer, H.T. 720-21;

(6) The Culture Fair administered to Petitioner had simplified directions, H.T. 52; 722; and

(7) The Culture Fair administered to Petitioner was renormed, changing the comparative standard from the general population to a population of prison inmates and vocational rehabilitation patients, H.T. 721-22.

All of the modifications Dr. Eber made to the test would artificially inflate scores obtained on the test that was given to Petitioner. H.T. 723.

Petitioner also presented testimony about the Culture Fair from other experts. In particular, the Court was impressed with the testimony of Ruth Luckasson, a Professor of Special Education at the University of New Mexico, and the current chair of the definitional committee for the American Association on Mental Retardation (AAMR), the preeminent organization dealing with mental retardation issues. The definition drafted by Professor Luckasson's committee has been widely accepted in the psychological community, has been adopted as authoritative by the American Psychiatric Association and the American Psychological Association, and provides the substance of the definition found in the DSM-IV. See H.T. 1563; 1573; 1593. In preparation for her testimony Professor

Luckasson conducted some research on the Culture Fair test (as published and without the Eber modifications) and found that the test is obscure; that it has not been published since 1970; and that an authoritative text on psychological tests, the Buros Mental Measurement Yearbook, reviewed the Culture Fair quite negatively, specifically criticizing its structure, its reliability and its construction. It was Professor Luckasson's opinion that the Culture Fair went out of print because of the highly negative peer reviews it was receiving.[19] (H.T. 102-03). Professor Luckkason concluded, after reviewing the modifications made by Dr. Eber, that there "was no validity left" in any measurement obtained from the test. (H.T. 115).

Likewise, Dr. John T. Cooper, a licensed psychologist who teaches Graduate level students at Argosy University found the results on the Culture fair wholly unreliable. Dr. Cooper, in addition to being a practicing psychologist, has specific experience and qualifications on which to base such an opinion. Dr. Cooper teaches graduate level courses in cognitive assessment, which is psychological testing. (H.T. 302). Thus, he is very familiar with psychological tests and what makes them reliable. Dr. Cooper, based on his professional experience as a psychologist and on his experience in teaching psychological testing, testified that the modifica-

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[19] Specifically, Buros stated:

> The manuals are woefully inadequate. One must not be overwhelmed by the array of references cited in the text of the manuals. The necessity and sometimes the impossibility of tracking down each citation also makes it hard on a conscientious reviewer. The necessary research to support the claims made for the test either has not been done or has not been thoroughly and clearly presented in the manuals. One is forced to suspend endorsement of the test and of its underlying theory.

H.T. 114.

tions Dr. Eber made to the Culture Fair would have "artificially inflated scores" making it "totally inappropriate to use that as a measure of intelligence compared to the general population." H.T. 314.

Respondent presented no evidence to contradict the testimony of Dr. Eber, Dr. Cooper or Professor Luckasson. The Court finds these witnesses to be credible and also finds as a matter of fact that the 111 Culture Fair score is useless and should not be factored into any calculation on mental retardation.[20]

e. Evidence That A Member Of The State Mental Health Diagnostic Team Evaluated Petitioner Pre-trial And Believed He Was Possibly Retarded

As noted above, the Court heard testimony from Dr. John T. Cooper, a licensed psychologist. Dr. Cooper, in addition to his testimony concerning the Culture Fair, testified about his

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[20] Respondent's position that the Court should reject the testimony of Dr. Eber because he did not personally assess Petitioner is rejected by this Court. The Ethical Guidelines for the Practice of Forensic Psychiatry cited by Respondent specifically allow psychiatrists to render an opinion without personal evaluation so long as that fact is made known. Dr. Eber, a psychologist (and thereby not bound by the ethical guidelines promulgated by the American Academy of *Psychiatrists*), never rendered an opinion that Petitioner was mentally retarded. In his affidavit testimony Dr. Eber merely testified that the results of the Culture Fair were not reliable and the results Petitioner obtained on other intellectual testing indicate Petitioner is of significant subaverage intelligence. (H.T. 724). In his live testimony before the Court, Dr. Eber answered a hypothetical question posed based on a series of test scores, and other criteria listed in Petitioner's Exhibit 49. Thus, Dr. Eber did nothing that violated the ethical canons cited by Respondent.

personal experience in examining Petitioner pre-trial. At the time of Petitioner's trial, Dr. Cooper was finishing his doctoral requirements. H.T. 697. One of the last requirements to complete before becoming a licensed psychologist is to do an internship. *Id.* In 1989, Dr. Cooper worked as an intern in the Forensic Unit of Georgia Regional Hospital which was headed by Dr. Martin Youngleson. Dr. Youngleson dispatched Dr. Cooper to conduct an evaluation of Petitioner, which was to consist of a clinical interview and the administration of two tests, the Minnesota Multiphasic Personality Inventory (MMPI) and the Rorschach ink blot test. *Id.* After speaking with Petitioner "for a considerable amount of time" Dr. Cooper began to administer the tests. H.T. 699. Because Petitioner could not read, a fact Dr. Cooper learned from Dr. Youngleson,[21] Dr. Cooper read him the MMPI and then administered the Rorschach.

After interacting with Petitioner for approximately four hours (H.T. 308), it was Dr. Cooper's belief that Petitioner was "operating with limited intellect . . . slow, probably at best in the borderline range of intellectual functioning." *Id.* Dr. Cooper believed Petitioner was intellectually limited because "his manner and pattern of speech, his vocabulary, and his thought pattern seemed to be that of someone with quite a low I.Q" and because Petitioner "was unable to read the

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[21] At the evidentiary hearing Respondent asserted that Dr. Cooper was told either by Petitioner or trial counsel that Petitioner could not read. However, the Court finds, based on Dr. Cooper's live testimony, that Dr. Cooper learned this fact from Dr. Youngelson. Although Dr. Cooper testified that he could not be absolutely certain that was where the information came from, he testified that he knew it before he met Petitioner (H.T. 327-28), and it was his recollection the information came from Dr. Youngleson. (H.T. 320).

MMPI and he exhibited communication and reasoning difficulties." (H.T. 699).[22]

At the time Dr. Cooper evaluated Petitioner his assignment was solely to render a differential diagnosis that did not encompass mental retardation. (H.T. 306). Dr. Youngleson did not direct Dr. Cooper to conduct any intelligence testing. H.T. 306. Dr. Cooper was never made aware that mental retardation might be an issue. H.T. 326-27. Therefore, Dr. Cooper never rendered an opinion concerning Petitioner's limited intelligence because he did not think it relevant to his assignment and because he had little or no background information upon which to render such an opinion. (H.T.690).

However, since his initial evaluation of Petitioner, Dr. Cooper has reviewed numerous documents, test data, testimony of experts, psychological reports, prison records and school records pertaining to Petitioner. H.T. 697-98. Based on the testing conducted by Dr. Shaffer and Dr. Kiehlbach, Petitioner's complete school records, Petitioner's Parole records, and the numerous affidavits of friends, family and teachers, Dr. Cooper "believe[s], consistent with the diagnosis of Dr. Shaffer, that Mr. Stripling is mentally retarded . . . [and that] Dr. Shaffer's diagnosis is consistent with my clinical impression of Mr. Stripling in 1989." (H.T. 700).

The Court finds Dr. Cooper's testimony to be credible and compelling especially in light of the fact that at the time he evaluated Petitioner he was working for the State's expert, Dr. Youngelson. Moreover, the Court finds that the fact that Dr. Cooper's testimony was not based solely on his recollection from his 1989 evaluation, but was based also on his review of notes he took contemporaneously with his

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[22] Dr. Cooper could not be any more precise as he was not directed by Dr. Youngleson to conduct intelligence testing at the time he examined Petitioner.

observations and testing and the results from those tests adds to the trustworthiness of Dr. Cooper's conclusions. (*See* H.T. 698-99).[23]

f. The State's Expert Never Evaluated Petitioner For Mental Retardation

At trial Dr. Youngleson testified that it was his opinion that Petitioner was not mentally retarded. Dr. Youngelson also testified at trial as he did before this Court, that he conducted no testing and arrived at his conclusion based on his "guestimate" that Petitioner was of average intelligence, "that would be somewhere between, about, with an IQ of 95 and 105." (Tr. 2312). Dr. Youngleson also testified that he did not believe Petitioner had deficits in adaptive functioning and based this opinion on his discussions "with people who saw him the day of the alleged event, and from the description of his behavior he seemed to be fairly well adapted." T.R. 2307. The people Dr. Youngelson spoke to were the deputy sheriff and Sheriff Lee, the arresting officer.[24] (Tr. 2307-08). Thus, the impression given to the jury at the time of trial was that Dr. Youngelson specifically evaluated Petitioner to determine if he was or was not mentally retarded and based on this specific evaluation, Dr. Youngleson concluded Petitioner was not mentally retarded. T.R. 2306. Based on the testimony of Dr. Youngleson, the jury was entitled to find that Petitioner

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[23] Thus, Respondent's assertion that Dr. Cooper's "recollection of his impression of Petitioner's intelligence came only from his memory of his interview with Petitioner" (Resp. Post-Hr'g Brief at 31) is clearly not supported by the record before this Court.

[24] Thus the sum of information on which Dr. Youngelson based his opinion, at least as to adaptive behavior, came from two people who hardly knew Petitioner and had limited involvement with him (none of it during the developmental period) and even then only in the criminal justice setting.

had not proven beyond a reasonable doubt that he was mentally retarded, a finding the jury made.

In the proceedings before this Court however, Dr. Youngleson revealed that he, in fact, did not evaluate Petitioner for mental retardation. Specifically, Dr. Youngelson testified in response to questions posed by the Court:

> Your Honor, I was only there for my testimony so I have no idea who else was a witness in the case. All I can do is say that at the time no one specifically said to me, either his attorney with whom I am sure I spoke and the district attorney, with whom I am sure I spoke, said to me specifically, the issue here is intelligence because had that been the issue in my mind I would have addressed in a whole lot more detail as I do when I am told that is the issue.

(H.T. 423-24).[25]

This testimony is consistent with Dr. Youngelson's deposition testimony where he testified that he would not use a "guestimate" in his professional practice (H.T. 1350), he would never use a "guesstimated" IQ numerical range in litigation (H.T. 1351) and that he would never use "guesstimating" in litigation because it would be "improper." (H.T.

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[25] Even when the Respondent tried to rehabilitate Dr. Youngleson's testimony, he would not testify that the "evaluation" he conducted was sufficient to diagnose or rule out mental retardation.

> Q: . . . Was your evaluation of him sufficient to make a determination as to whether or not he was mentally retarded?
>
> A: I believe that my evaluation would have told me if there was a developmental delay issue.

(H.T. 424).

1357-58). Dr. Youngelson admitted that in order to do a proper evaluation for mental retardation he would:

> Number one, I would interview the individual. Number two, I would either do some psychological testing myself or have it done by an associate or a psychometrist if I thought that retardation was something that was an issue.
>
> I also would make sure that I had some information about the adaption [sic] level of the person and this can be, depending on the age of the person, this information can be found either with the person, him or herself, of from the parents or caregivers of the person.

H.T. 1334. Further, Dr. Youngleson would have wanted to know Petitioner's "history of childhood IQ scores" because it would be "relevant to show that 20 years ago, 30 years ago, 50 years ago somebody had a low IQ." H.T. 1338.

The Court has compared the testimony of Dr. Youngleson at trial with his deposition testimony and his live testimony at the evidentiary hearing. The Court credits Dr. Youngleson's testimony before this Court that at the time he evaluated Petitioner in 1989, he did not know mental retardation was an issue at trial and that if he had, he would have conducted testing, would not have used a "guesstimated" IQ score and would have, in general, done a more detailed investigation into the issue. H.T. 423-24. The Court finds further support for this conclusion in the testimony of Dr. Cooper who testified that as the intern for Dr. Youngleson at the time, he "would do all the testing" in those cases he was involved in through the forensic department. H.T. 304. In Petitioner's case, however, he did not administer any intelligence tests to Petitioner because he had not been directed to do so, and to his knowledge none were ever given by anyone else. H.T. 327. Dr. Cooper also had no idea intelligence was an issue in his case because, "[h]ad I had any idea of that, I would have at least been saying shouldn't we do some intel-

ligence testing because I would have had to do all the work, anyway. But I had no idea of that." *Id.* Thus, at the time the State's mental health professionals examined Petitioner they did not understand that mental retardation was to be an issue at trial, but were instead focused on competency and insanity. H.T. 328. The Court thus finds that any testimony at trial by Dr. Youngleson that Petitioner was not mentally retarded has been significantly undermined. Every other mental health professional who has evaluated Petitioner or reviewed the relevant documents and test data with the express purpose of determining the issue of mental retardation has reached the same conclusion—Petitioner is mentally retarded.[26]

g. Evidence Of Deficits In Adaptive Behavior

At trial scant evidence of deficits in adaptive functioning, the second element of the definition of mental retardation, was presented. As noted above, Petitioner's mother testified only that Petitioner had difficulties in school and that other

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[26] The Court has considered Respondent's contention that Dr. Timothy Derning who tested Petitioner and obtained a score of 72 on a WAIS-lII "presumably made a finding that Petitioner is not mentally retarded." (Resp. Post-Hr'g Brief at 9). Respondent's position is wholly unfounded and unsupported by the record before this Court. The only evidence before this Court establishes that Dr. Derning believed his test scores on the WAIS-III administered in 1995 was consistent with subaverage general intellectual functioning. On cross-examination counsel for Respondent elicited from Professor Luckasson that it was her "understanding . . . that Dr. Derning concluded that those scores were consistent with mental retardation." H.T. 146.

This is so because, as all parties agree, the WAIS is subject to a 5 point margin of error and, therefore "it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior." See DSM-IV-TR at 41-42, DSM-III-R at 28, DSM-III at 36.

kids called him slow. Dr. Kiehlbach's only testimony on deficits in adaptive behavior was that Petitioner exhibited such deficits by virtue of his involvement in this case.[27] Dr. Harris gave only a small amount of unsubstantiated testimony concerning deficits in adaptive functioning. He interpreted the limited school records that were obtained in conjunction with the testimony of Petitioner's mother and testified that Petitioner had "poor social and intellectual adjustment." He also conclusorily noted, without giving any examples, that Petitioner kept to himself. Tr. 1971.

AAMR and DSM-1V[28] require that deficits in at least two of ten listed areas of adaptive functioning be found before a diagnosis of mental retardation can be rendered. At best, the testimony offered at trial established that Petitioner had defi-

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[27] In his Brief, Respondent asserts that Dr. Kiehlbach gave other testimony related to deficits in adaptive behavior and cited his testimony about Petitioner hearing voices at the age of 6, Petitioner starting fires as a juvenile because of the voices, and Petitioner retreating into a fantasy land which led him to have little contact with others. Resp. Post-Hr'g Brief at 55-56. The Court notes that the testimony cited by Respondent (with the possible exception of the reference to isolation) is not relevant to deficits in adaptive functioning but were offered as evidence of schizophrenia.

[28] The Court notes that the predecessors to DSM-IV did not specifically list the categories of adaptive behavior. However, Professor Luckasson, who chaired the committee that promulgated the definition of Mental Retardation that was adopted by the DSM-III, DSM-III-R, and DSM-IV, testified that although the categories were not specifically enumerated in DSM-III and III-R, they were the measure for determining deficits in adaptive functioning, and that the addition of the 10 categories in DSM-IV did not alter "the substance of the definition." H.T. 116. As there has been no evidence to the contrary, the Court credits this testimony as accurate and unrefuted.

cits in "functional academics" and "social skills." However, even this evidence was marginal and not well corroborated.

Petitioner presented to this Court affidavit testimony from 19 lay witnesses who knew Petitioner at various points in his life and 4 educators who had either taught Petitioner or were responsible for administrative duties at the schools he attended. These 23 people collectively paint a picture of Petitioner during the developmental period which indicates that he had deficits in every category listed by the AAMR and DSM-IV. In summary,[29] the affidavit testimony of these witnesses[30] present compelling evidence that Petitioner:

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[29] The Court notes that the following list is but a few of the more compelling pieces of testimony establishing deficits in adaptive functioning.

[30] Respondent suggests that the affidavit testimony of these witnesses should be disregarded because the affiants have an obvious bias for Petitioner. The Court recognizes that in some instances family and friends may shade their testimony to benefit a defendant. However, in this instance, the common themes running through affidavits from so many different sources go a long way toward assuaging any worries about individual dishonesty. The testimony of these witnesses is also bolstered by documentary evidence, *e.g.*, school and prison records, which indicate that many people have long noticed that Petitioner is slow. Moreover, the teachers have no motive to lie for a child they taught over 30 years ago. Finally, the Court notes that the nature of the testimony would be inherently harmful to Petitioner – *i.e.*, it paints him in a poor light. Lay witnesses are probably less likely to make up facts that paint Petitioner as stupid, slow, or as defecating in his pants. The Court has considered Respondent's argument and rejects it. The Court finds the affidavit testimony of these witnesses to be credible.

(1) by the age of 11 or 12, was unable to learn toilet training and was still defecating in his pants, H.T. 655; 775; 783;

(2) at the age of 10, was still unable to make a peanut butter and jelly sandwich, H.T. 760;

(3) as an adult, in order to work a construction job, had to have his supervisor mark an "X" each place Petitioner was to hammer a nail, H.T. 808;

(4) as a child did not play games with other children because he could not understand the rules, H.T. 775;

(5) was consistently classified as much slower than his peers by teachers, H.T. 737;

(6) had to have his younger sister dress him until he reached the 6th grade, H.T. 763;

(7) as an adult, was unable to deal with basic home living responsibilities such as shopping for groceries, cleaning, and balancing a checkbook, H.T. 838;

(8) as a boy could not learn to take the correct school bus even though he was repeatedly told which one to take, H.T. 776; and

(9) has consistently throughout his entire life been recognized as "slow," H.T. 739; 740.

None of this compelling evidence was presented to the jury at Petitioner's original trial.[31]

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[31] The Court notes that Dr. Kiehlbach has testified in this proceeding that he believed defense counsel were going to present lay witnesses to establish the second element of the definition. This misunderstanding is attributable to defense counsel and is evidence of deficient performance under *Strickland v. Washington*. However, regardless of the reason, the fact remains that this type of compelling and highly relevant evidence should have been pre-

B. Conclusions of Law

Respondent has asserted that this claim was "addressed and decided adversely to Petitioner on direct appeal." While "issues previously decided by a court of competent jurisdiction are conclusive and constitute a procedural bar to relitigation," *Crowder v. State*, 265 Ga. 719 (1991); *Turpin v. Lipham*, 270 Ga. 208 (1998) (the principal of res judicata is binding in habeas corpus proceedings), "a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice." *Walker v. Penn*, 271 Ga. 609, 611(1999). The Court finds as a matter of law that the new evidence of Petitioner's mental retardation demonstrates that his execution would be a miscarriage of justice and that the principal of *res judicata* does not prevent this Court from addressing the merits of the issue. Thus, as a matter of law Claim I is properly before the Court.

1. The Execution Of Someone Who Is Mentally Retarded Would Be A Miscarriage Of Justice

While the Georgia Supreme Court has not adopted a comprehensive definition of "miscarriage of justice,"[32] the

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sented to any decision maker determining whether Petitioner is or is not mentally retarded, and the Court has specifically considered it under a miscarriage of justice analysis.

[32] "We hazard here no definitive limits on the term "miscarriage of justice." That must await case-by-case development, and will depend largely upon the sound discretion of the trial judge. However, the term is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is *not* guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry. (A plain example is the case of mistaken identity.)" *Valenzuela v. Newsome*, 253 Ga. 793, 799, 325 S.E.2d 370, 374 (1985)(emphasis in original).

Court has, in at least one context, expressly held that it would be a miscarriage of justice to execute a person who is mentally retarded. *See, Turpin v. Hill*, 269 Ga. 302 (1998).

In 1988 the Georgia legislature enacted an amendment to O.C.G.A. §17-7-131 which prohibited execution of a capital defendant who has proven beyond a reasonable doubt that he is mentally retarded. The next year, the Georgia Supreme Court held that Article I, Section l, paragraph 17 of the Georgia Constitution (the state version of the 8th Amendment) prohibits the execution of the mentally retarded. *Fleming v. Zant*, 259 Ga. 687, 690 (1989). The Court, in no uncertain terms, announced "although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment." *Id.*[33] Thus, in line with other circumstances which render defendants constitutionally ineligible for execution, including youth,[34] and mental incompetency,[35] there is a categorical bar

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[33] Because the Court found the state Constitution created a categorical prohibition against executing the mentally retarded, it had to address what to do with people who were sentenced to death before this prohibition came into existence. In order to remedy the patent inequity, the Court created a remedial process whereby a death-sentenced habeas corpus petitioner who was tried before the enactment of O.C.G.A. §17-7-131(j) could present sufficient credible evidence (which must include a diagnosis of mental retardation by at least one expert) to create a genuine issue as to retardation. Upon such a minimal showing, the habeas court is directed to issue a limited writ of habeas corpus returning the case to the trial court for a jury trial solely on the issue of mental retardation. *Fleming v. Zant*, 259 Ga. at 691.

[34] See O.C.G.A. § 17-9-3 (prohibiting death sentence for persons under the age of 17 at the time of the offense); *Bankston v. State*, 258 Ga. 188, 189, 367 S.E.2d 36 (1988); *see also Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Eighth Amendment prohibits

to the execution of the mentally retarded. *Fleming*; O.C.G.A. § 17-7-131(j).

In *Turpin v. Hill*, almost a decade after *Fleming*, the Supreme Court was faced with a situation where a habeas petitioner (who was tried after O,C.G.A. §17-7-131 was amended) raised the substantive issue of his mental retardation before the habeas corpus court solely under a "miscarriage of justice" analysis. In response, the Warden raised the affirmative defense of procedural default because the issue of mental retardation had not been raised at trial and there had been no assertion of cause and prejudice to overcome the procedural default. The habeas court, over Respondent's objection, addressed the substantive mental retardation claim on its merits. The habeas court, employing the procedures outlined in *Fleming*, granted a limited writ of habeas corpus and remanded the case to the trial court for a jury trial on the issue of mental retardation. The Supreme Court found that the habeas court was correct in addressing the substantive mental retardation issue because to fail to do so would constitute a miscarriage of justice. The Court specifically noted:

> In light of this Court's holding that the execution of the mentally retarded constitutes cruel and unusual punishment under the Georgia Constitution, we find no error in the habeas court's consideration of appellee's claim of mental retardation. **In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.**

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imposition of death sentence on offenders under the age of 16 at the time of the offense).

[35] *See* G.C.G.A. § 17-10-61 (prohibiting execution of person who is "presently unable to know why he or she is being punished and understand the nature of the punishment"); *see also*, *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment prohibits execution of a person who is insane).

Turpin v. Hill, 269 at 303 (emphasis added).

The *Hill* Court, however, overruled the habeas court to the extent that it applied the *Fleming* procedure to a mental retardation claim being addressed under a miscarriage of justice rubric. The Court held that in cases where a substantive issue of mental retardation is raised in habeas corpus proceedings that the habeas court is to "determine without intervention of jury, whether [the habeas petitioner] can establish, under the applicable standard set forth in O.C.G.A. § 17-7-131(c)(3), that he is mentally retarded so as to invoke the bar against execution." *Id.*, at 304.

Thus, according to the Georgia Supreme Court decisions, this Court, faced with a situation where a substantive issue of mental retardation is presented by a death-sentenced inmate's petition for writ of habeas corpus, is to hear the evidence "without intervention of a jury" and determine if the habeas petitioner has proven his mental retardation beyond a reasonable doubt. If the answer to that question is yes, then this Court is to grant the writ and vacate the death sentence. *See Turpin v. Hill, supra.*

This procedure is in accordance with the United States Supreme Court's determination of similar issues. In the Supreme Court's federal habeas corpus jurisprudence, the Court has noted that it would be a miscarriage of justice to execute someone who is actually innocent of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992). The Court noted that while "the phrase innocent of death is not a natural usage of those words" a person is actually innocent of the death penalty when evidence establishes that he would not be eligible for the death penalty because some constitutional or state statutory prerequisite for its imposition could not have been satisfied. *Id.*, at 341.

The Court went on to note that "[t]he actual innocence requirement must focus on those elements which render a

defendant eligible for the death penalty." *Id.*, at 347. If there exists a statutory or constitutional bar to the imposition of the death penalty on an individual, then the individual is actually innocent. For example, if no valid aggravating circumstances exist, then the defendant is ineligible for the death penalty and thus, actually innocent of the death penalty. *See Zant v. Stephens*, 462 U.S. 862 (1983). Likewise, because the Eighth Amendment prohibits the execution of a 15 year old offender, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a 15 year old is actually innocent of the death penalty.

Under O.C.G.A. §17-7-131, Article 1, Section 1, Paragraph 1 of the Georgia Constitution and under the Eighth Amendment of the United States Constitution, as recently interpreted in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), the execution of the mentally retarded would be a miscarriage of justice because both the State and Federal Constitutions prohibit such action.[36] Thus, regardless of whether the issue of mental retardation was litigated at trial, under *Turpin v. Hill supra*, *Fleming v. Zant*, *supra*, and *Walker v. Penn*, *supra*, the Supreme Court of Georgia determined that a claim of mental retardation should be heard by this Court under the miscarriage of justice exception.

Although this Court is free to analyze Petitioner's substantive mental retardation claim under a miscarriage of justice exception, the Supreme Court has made clear that it "has never authorized a habeas court to apply the miscarriage of justice analysis in order to substitute its judgment for that of a court of competent jurisdiction." *Walker v. Penn*, 271 Ga. at 611. This is so because this Court is precluded from "substitut[ing] its own analysis on the same facts already decided by the trial court." *Id.* Thus, in order for this Court to address Petitioner's substantive mental retardation claim,

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[36] This premise was expressly recognized in *Moore v. Texas* 122 S.Ct. 2350 (2002), (Scalia, J., dissenting from stay of execution).

Petitioner's substantive mental retardation claim, Petitioner must support his claim "with new reliable evidence that was not presented at trial." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298 (1995). Petitioner has done so.

2. Petitioner Is Mentally Retarded And His Execution Would Be A Miscarriage of Justice

The Court finds that the evidence and testimony presented during these habeas corpus proceedings, along with the evidence and testimony presented at his original trial, establish that Petitioner suffers from "significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." O.C.G.A. 17-7-131. Further, the Court finds that Petitioner has proved this beyond a reasonable doubt.

The Court credits the testimony of Ruth Luckasson, Robert Shaffer, and John Cooper, all witnesses who possess special knowledge and/or skills pertaining to mental retardation. Further, the Court finds that Dr. Martin Youngleson, who testified at Petitioner's trial that Petitioner was not mentally retarded, has since revealed that he had no basis for that testimony as he is not an expert in mental retardation, and he never examined Petitioner for mental retardation.

The Court finds, based on documentary evidence, the testing of Dr. Kiehlbach, Dr. Shaffer, Dr. Derning, and various tests administered to Petitioner by Atlanta City Schools and Georgia Department of Corrections, that Petitioner has established a 30 year pattern of IQ scores or equivalents in the mentally retarded range. Further, the Court finds based on the testimony of Dr. Eber, Dr. Cooper, and Professor Luckasson that the 111 score on the Culture Fair is wholly unreliable and is of no worth in determining intelligence. The Court notes there is absolutely no evidence to indicate that Petitioner has ever scored outside the mentally retarded range

on any test that legitimately measures IQ. The Court credits the test score obtained by Dr. Shaffer as being indicative of the fact that Petitioner is still functioning in the mildly mentally retarded range.[37] The 64 obtained by Dr. Shaffer is remarkably consistent with the other test scores obtained during the 30 years Petitioner has taken various IQ tests.

The Court, based on the affidavit and deposition testimony of lay witnesses, teachers, attorneys and mental health professionals concludes that Petitioner has demonstrated impairments in adaptive behavior. Moreover, the Court finds that the testimony presented by Petitioner in this case establishes that Petitioner has suffered from these deficits since early childhood. Lastly, based on Petitioner's school records, the Parole Records that were withheld at trial, the prison records, and all the testimony and other documentation presented in this proceeding, the Court concludes that Petitioner's "significant subaverage intellectual functioning resulting in or associated with deficits in adaptive behavior" manifested during the developmental period, *i.e.*, before 18. The school records indicate that Petitioner obtained IQ equivalent scores of 64 and 52 on tests administered to him by the City of Atlanta School System when he was in the 3rd and 5th grades.[38] The Parole records reveal that Petitioner at

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[37] Respondent's assertion that the 64 obtained on the Stanford Binet intelligence test given by Dr. Shaffer should be discredited because the test "is not considered in the psychological community to be a reliable determinant of an adult's IQ" is clearly misplaced. As noted earlier, the DSM-III, III-R and IV all make specific reference to the Stanford Binet as a test to be utilized when determining IQ. Further, as Professor Luckasson testified, the Stanford Binet and the Wechsler Scales are the "gold standard" for diagnosing mental retardation. H.T. 101.

[38] The Court notes that these scores are compelling evidence to refute any argument that Petitioner might have been malingering when he was tested by Dr. Kiehlbach, Dr. Derning, and Dr.

the age of 16 scored a 67 on an unidentified IQ test administered by the Department of Corrections. Petitioner's prison records indicate that at 17 he scored a 68 on a Peabody IQ test again administered by the Department of Corrections. These scores, along with the compelling testimony from teachers, family, friends and acquaintances describing deficits in adaptive behavior that were present from early childhood on leads this Court to find as a matter of law that Petitioner has proven his mental retardation beyond a reasonable doubt.

Pursuant to *Fleming v. Zant*, *supra*, and *Turpin v. Hill*, *supra*, the Court concludes as a matter of established Georgia Supreme Court law that the execution of Mr. Stripling would constitute a miscarriage of justice. Accordingly, although mental retardation was an issue litigated at trial, the miscarriage of justice exception to the res judicata doctrine allows this Court to address Petitioner's substantive mental retardation issue in these habeas corpus proceedings. *Walker v. Penn*, *supra*. Further, because the Court has concluded that Petitioner has proven his mental retardation beyond a reasonable doubt in these habeas corpus proceedings, pursuant to *Turpin v. Hill*, *supra*, this Court hereby vacates Petitioner's death sentence and remands the case to the Superior Court of Douglas County for imposition of an appropriate non-capital sentence.

II. Whether The State Suppressed Material Exculpatory Evidence Relating To Petitioner's Mental Retardation

In Claim III of his Amended Petition for Writ of Habeas Corpus, Petitioner alleges that he was deprived of due proc-

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Shaffer. The pattern of consistently low scores, over a thirty year period also belie any assertion of malingering. Moreover, Dr. Shaffer specifically addressed the issue in his examination of Petitioner and determined that malingering was not an issue.

ess and a fundamentally fair and reliable capital proceeding when the State withheld material exculpatory evidence relating to his mental retardation. Specifically, Petitioner alleges that the Parole files which the trial court reviewed *in camera*, and the report and notes of Dr. John T. Cooper, should have been disclosed.

Respondent asserts that the Parole records issue is res judicata, arguing that the Georgia Supreme Court addressed the issue and ruled adversely to Petitioner on direct appeal. (Resp. Brief at 16). As to Dr. Cooper's notes and report, Respondent argues that this claim is procedurally barred because it was not raised at trial or on direct appeal. (Resp. Brief at 29). In the alternative, Respondent argues that: (1) the report and notes are not favorable to Petitioner's mental retardation claim (*Id.*); (2) Dr. Cooper's identity and role in the case were made known to Petitioner during the course of the trial and "were likely provided to counsel prior to trial." (*Id.*, at 30); (3) that Petitioner has failed to establish that the prosecution suppressed the evidence (*Id.*); and (4) the evidence was not material. *Id.*, at 31.

A. Parole Files

In these proceedings Petitioner offered into evidence his Parole records, which trial court refused to disclose to the defense and which were sealed for appellate review. See H.T. 479-559. The Court notes that the trial court reviewed the records *in camera* and found them to contain exculpatory evidence. The trial court, however, refused to disclose that exculpatory evidence to the defense, holding that it was either hearsay or cumulative. Mr. Stripling's counsel argued on appeal, pursuant to *Pope v. State*, 256 Ga 195 (1986), and *Walker v. State*, 284 Ga 149 (1985), that the trial court abused its discretion in failing to turn over the Parole records to the defense. The Georgia Supreme Court denied relief on this claim.

1. Findings of Fact.

The Court finds as a matter of fact that:

* the Parole files were in the possession of the State Board of Pardons and Paroles;

* the Parole files were in the possession of the trial court:

* the Parole files contained evidence favorable to the defense;

* the defense could not have obtained these files by the exercise of due diligence;

* the Parole files contained material that the defense could not have obtained through any other source;

* the Parole files contained information that the defense did not have at the time of trial;

* the State of Georgia suppressed the Parole files; and

** the suppression of the Parole files prejudiced the defense.

The Parole records in question clearly contained evidence that supported Petitioner's defense of mental retardation. As Professor Luckasson testified:

> When I went through those parole records, I found about 25 indications that I looked at that were consistent with mental retardation. They were either references to academic scores, to his academic achievement, they were references to his limited mental ability. There were a couple of statements about mental retardation. And there were other references to behavior or characteristics that were consistent with mental retardation.

H.T. 126. The following are a few of the facts revealed by the Parole file that were favorable to the defense that were

not presented at trial and were not available through other sources:

(1) documentation indicating Petitioner, at the age of 16, scored a 67 on an IQ test, H.T. 517;

(2) reports of Department of Corrections staff indicating Petitioner was mentally retarded, H.T. 543;

(3) reports indicating that Petitioner's mother had been consistently reporting that Petitioner is mentally retarded and slow, H.T. 517; 540;

(4) reports indicating that State officials called into question the validity of the 111 Culture Fair score, H.T. 517;

(5) repeated references to Petitioner being of limited mental ability, H.T. 505; 518; 540; 543; 547-48; 552; and

(6) reports demonstrating that Petitioner exhibited deficits in adaptive behavior, See: H.T. 518; 539; 540; 542-45; 546; 547-48; 552.

Further the Court finds that defense counsel subpoenaed these records at trial and the Court did an *in camera* inspection but refused to turn over any portion of the files. Trial counsel ensured that the records were part of the record on appeal but could not have raised the claim as a *Brady* violation because he did not know the contents of the file. Therefore, the Court finds that the information contained in the Parole files could not have been obtained by Petitioner with the exercise of due diligence.

2. Conclusions of Law

Under Brady, the prosecution has an affirmative constitutional obligation to disclose exculpatory evidence to a criminal defendant if it is material to either guilt or to punishment. *Brady v. Maryland*, 373 U.S. at 87 (1963). The duty to dis-

close encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The final determination of materiality is based on the "suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436-37.

Under the decisions of the Georgia Supreme Court, in order to make out a *Brady* claim, Petitioner must show "(1) that the State possessed evidence favorable to the defense; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed to the defense a reasonable probability exists that the outcome of the proceedings would have been different." *Zant v. Moon*, 264 Ga. 93, 100 (1994).

Initially, the Court notes that it has reviewed the direct appeal brief of Petitioner and the direct appeal opinion of the Georgia Supreme Court and finds as a matter of law that the Parole records issue was never raised in the context of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Instead, counsel raised the issue under *Pope v. State*, *supra* and *Walker v. State*, *supra*, claiming that he was entitled to at least those portions of the Parole file that were potentially mitigating. *See*, Appellant's Brief at 30-31. *Walker* and *Pope* both authorize disclosure of Parole files where evidence contained therein would impact on the penalty phase of the trial, *i.e.*, those portions of the records that provide mitigating evidence. This is the manner in which the claim was raised and the manner in which the Supreme Court decided the issue as

evidenced by the clear language and citation used by the Court:

> The trial court reviewed Stripling's parole file and determined there **was** no potentially **mitigating** evidence in the file not already known to and available to the defendant. We have reviewed the file and find no error in the nondisclosure of the defendant's parole file. *Walker v. State*, supra.

Stripling v. State, 261 Ga. 1, 6 (1991)(emphasis added). Clearly, the Court evaluated the Parole file under *Walker* and not under *Brady*, and therefore the principal of *res judicata* does not apply to the instant analysis. The Court finds further support for this conclusion in the standard of review applied by the Georgia Supreme Court in *Stripling v. State*. There the Court noted that it was reviewing whether the trial court's failure to turn over the Parole files constituted an abuse of discretion. However, a *Brady* claim presents at least a mixed question of law and fact, where the conclusions of law are subject to *de novo* review. *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999). The Court finds that the trial court had the records before it and it knew that mental retardation was the thrust of the defense. As noted above, the State made a number of arguments that were expressly refuted by information contained in the Parole records. Still the trial court did not disclose the contents of the file even though it had the duty to. The Supreme Court also had the records before it and had the issue been raised as a *Brady* claim, the Court would have had no option but to find, as this Court has, that the records contained impeachment information and information that was exculpatory (rather than *mitigating*) to the defense of Guilty But Mentally Retarded. Thus, the Court concludes as a matter of fact and law, that the Supreme Court did not address a *Brady* claim because no such claim was presented. Further, the Court finds as a matter of fact and law that trial counsel

had no basis for raising a *Brady* claim because they did not know the contents of the Parole file.

The Court also finds as a matter of law that the Parole records were in the possession of the State, albeit the State Board of Pardons and Paroles. In *Kyles v. Whitley*, 514 U.S. 419, 438 (1995), the State put forth an argument that because the prosecution did not know of the favorable evidence in the possession of another state agency[39] no *Brady* violation could be asserted. The Court rejected such an argument noting:

> since the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor . . . as the final arbiters of the government's obligation to ensure a fair trial.

Id. Such is the case here. There is no dispute. The Parole records were in the possession of the State and the State was the party prosecuting Petitioner. The duty to ensure that a defendant is assured a fair trial not only rests with the prosecutor, but also with the trial judge, the appellate courts and ultimately the State of Georgia. The State's duty is magnified when the death penalty is being sought. *Gardner v. Florida*, 430 U.S. 349 (1977).

The Court finds as a matter of law that the Parole records were material and, had they been disclosed, there is a reasonable probability the outcome of Petitioner's trial would have been different, i.e, there is a reasonable probability the jury would have found him Guilty But Mentally Retarded. The materiality of the Parole files is demonstrated in a number of instances, including but not limited to:

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[39] In *Kyles*, the other agency was the police department.

* The State argued that Petitioner was not mentally retarded based on the I.Q. score of 111 on the Culture Fair test. (Tr. 2457, 2548, 2551) However, the Parole files contained a document wherein employees of the Board of Pardons and Paroles questioned the validity of the test. (H.T. 517);

* The prosecution argued that Mr. Stripling's low IQ score on the WAIS-R was the result of depression (H.T. 2450-55), while the Parole file indicated a pattern of consistently low IQ scores, which showed that depression was not a factor. (H.T. 517, 552, 557);

* The prosecution argued that Mr. Stripling's low IQ score on the WAIS-R was the result of malingering because he was "looking straight down the barrel of the electric chair." (Tr. 2458-59; 2472-74). The Parole file however, indicates that Mr. Stripling had performed in the mentally retarded range his entire life and on a variety of testing instruments. (H.T.517, 542-43, 547, 552-53);

* The prosecution argued that the mental retardation defense was a "trick," and that Mr. Stripling's claim to be mentally retarded was a recent fabrication. (Tr. 2472-74). The Parole file indicated that he had been classified as mentally retarded or mentally slow since adolescence including, on several occasions, by state officials. (Tr. 517, 542-43, 552); and

* The State argued that Petitioner's mother's testimony that Petitioner was mentally retarded could not be believed because she had never mentioned it before her son was on trial for his life. (Tr. 2470-71; 2473-74). The Parole file, however, contained documentation that she reported her son to be mentally retarded well before he was arrested in this case. (H.T. 517, 540).

The Court finds that if trial counsel had these files they could have mounted a legitimate counter attack to every as-

pect of the State's case against mental retardation. Had the Parole records been disclosed to defense counsel, there is more than a reasonable probability the outcome of Petitioner's trial would have been different in that there is a reasonable probability that Petitioner would have been found Guilty But Mentally Retarded.

The Court therefore finds as a matter of fact and law that the Parole files contained evidence favorable to the defense, were in the possession of the State, could not have been obtained by Petitioner, and were material in that had they been disclosed to defense counsel, there is a reasonable probability Petitioner would have been found Guilty but Mentally Retarded and sentenced to life in prison.

B. Dr. Cooper's Notes And Report

1. Findings Of Fact

The Court makes the following finding of fact:

* Dr. Cooper's notes contained evidence favorable to the defense;

* the defense could not have obtained Dr. Cooper's notes and report with the exercise of due diligence;

* Dr. Cooper was a member of the prosecution team in that he was the assistant to the key State witness against Petitioner's mental retardation defense;

* Dr. Cooper's notes and report were in the possession of the prosecution;

* the prosecution failed to disclose Dr. Cooper's notes and report to the defense; and

* the prosecution's failure to disclose the notes and report prejudiced the defense.

The Court finds as a matter of fact that Dr. Cooper's notes and report contain information that is favorable to Peti-

tioner's mental retardation claim. As Dr. Cooper himself noted:

> Although I was not even considering the issue of mental retardation at the time of my evaluation of Mr. Stripling, the report I submitted to Dr. Youngleson contains numerous observations that are consistent with a diagnosis of mental retardation. For instance, I reported that Mr. Stripling's reality contact was impaired and that he does not merely misperceive reality, he severely distorts it. Further, it was my opinion that Mr. Stripling did not have the resources to direct his own behavior, he had an inability to process external cues, he did not exhibit an ability to cope with various situations, and he was likely to approach problem solving with a trial and error approach rather than with reason. I also noted that, like others who are mentally retarded, Mr. Stripling's aspirations exceed his functional ability, and he consequently tried to avoid complexity because he could not deal with even mildly complex situations. I did not attribute these characteristics to Mr. Stripling being mentally retarded because, as I said earlier, I had not been instructed to look for evidence intellectual functioning and was not aware that it was to be an issue. Had I been told that mental retardation might be an issue I would have noted that these traits could be evidence of deficits in adaptive functioning indicative of mental retardation.

H.T. 700-701. Similarly, Dr. Cooper's notes contain numerous notations that are indicative of deficits in adaptive behavior. *See*, H.T. 707-714.

2. Conclusions Of Law

The Court finds that knowledge of what was contained in Dr. Cooper's notes and reports will be imputed to the prosecutor as the prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's be-

half in the case. *Kyles v. Whitley*, 415 U.S. at 438. Dr. Cooper was working for the key State mental retardation witness, Dr. Youngleson, and helped him to evaluate Mr. Stripling for purposes of the trial. Thus, for purposes of the State's *Brady* obligation, Dr. Cooper's notes were in the possession of the prosecutor at the time of trial.

The Court finds as a matter of fact and law that contrary to Respondent's assertions, Dr. Cooper's identity and role in the process were not disclosed to the defense simply by oblique references to Dr. Youngleson's "intern." Nothing in the trial transcript even hints at the depth of information that is contained in Dr. Cooper's notes and report. The only thing that Dr. Youngleson indicated Dr. Cooper did was to administer the Rorschach Ink Blot Test and read the MMPI to Petitioner. Moreover, assuming *arguendo* that his identity was disclosed at trial,[40] the timing of the disclosure effective prohibited defense counsel from learning anything about what Dr. Cooper did or had to say. Respondent's position is untenable. This Court finds as the Eleventh Circuit has that the fault is not with Petitioner but with the State, because:

> this Court is unwilling to hold on the facts of this case that, if the prosecutor failed to produce evidence which was required to be produced under *Brady* and which failure was unknown to defendant's counsel, the claim is procedurally barred because defense counsel did not ferret out the violation. Such a ruling would reward the wrongdoer because he was not timely found out. . . . The rule that invokes a procedural bar in most instances is a

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[40] On one occasion Dr Youngleson, near the end of his cross-examination testimony, uses the name "Cooper." (Tr. 2327). However, this fact does not change the analysis. Such disclosure, occurring at such a late stage in the proceedings, is the functional equivalent of no disclosure at all.

> much needed and salutary rule, but not if it is to be applied because the defendant's counsel was too trusting and accepted the representations of the prosecutor. Defense counsel should be able to rely on a belief that prosecutors will comply with the Constitution and will produce *Brady* material.

Julius v. Jones, 875 F.2d 1520, 1525 (11th Cir.1989) *see also Smith v. Zant*, 250 Ga. 645, 652 (1983) ("The state urges that the defendant should have done more than he did to protect himself. We find that the state should have done more than it did to protect the defendant's rights.").

Lastly, the Court finds as a matter of law that the information contained in Dr. Cooper's notes and report is material. Dr. Youngelson was the only mental health expert who testified that Petitioner was not mentally retarded. He "guesstimated" Petitioner's IQ to be between 95 and 105 and based this "guestimate" not on any intelligence testing (none was done) but on his interviews with Petitioner. Dr. Cooper was present on at least one occasion when Dr. Youngleson interviewed Petitioner. However, Dr. Cooper reached the exact opposite conclusion – he believed Petitioner to be "borderline at best." Merely having a state employed mental health professional testify that he believed Petitioner may have been mentally retarded could have caused a different verdict. The additional fact that Dr. Cooper came to a totally different conclusion regarding Petitioner's intelligence than Dr. Youngleson did, even when they conducted part of the evaluation together, is information that would have put the State's "case in such a different light as to undermine confidence in the outcome." *Kyles v. Whitley*, 514 U.S. at 435.

The Court therefore finds that Dr. Cooper's notes and report contained evidence that was favorable to the defense. Further, the Court finds that Dr. Cooper's notes and report were in the possession of the prosecution team and knowledge of the contents of the notes and report are to be imputed

to the prosecutor. Moreover, the Court finds that Petitioner could not have discovered the notes and report with the exercise of due diligence as the disclosure of the identity of Dr. Cooper did not occur until nearly the end of the State's rebuttal case. Finally, the Court finds that had Dr. Cooper's notes and report been disclosed to the defense there is a reasonable likelihood the outcome of Petitioner's trial would have been different – *i.e.* the jury would have found him guilty but mentally retarded.

Further, and assuming *arguendo* that the Parole records and Dr. Cooper's notes and report are not material on their own, the Court finds that the cumulative effect of their suppression undermines confidence in the outcome of Petitioner's trial. Had the Parole records and Dr. Cooper's notes and report been disclosed to the defense, the State's case would have been cast in a different light and there is more than a reasonable probability that the jury would have found Petitioner guilty but mentally retarded. *Kyles v. Whitley*, 514 U.S. 437.

So finding, the Court hereby vacates Petitioner's death sentence and orders that he be retried within a reasonable period of time.

III. Whether Petitioner Received Constitutionally Ineffective Assistance Of Counsel In The Presentation Of The Guilty But Mentally Retarded Defense

In Claim II of his Amended Petition for Writ of Habeas Corpus, Petitioner alleges that he was denied effective assistance of counsel in the investigation, preparation and presentation of the Guilty But Mentally Retarded defense. Trial counsel were appellate counsel, and pursuant to *White v. Kelso*, 261 Ga. 32 (1991), they could not be expected to raise and litigate their own ineffectiveness on direct appeal. New counsel for Petitioner became involved post-conviction and immediately raised the issue of trial and appellate counsel's

ineffectiveness. Thus, as Respondent concedes, this claim is properly before the Court for ruling on the merits. *See Glover v. State*, 266 Ga. 183 (1996).

Mr. Stripling has raised both a claim of "actual ineffectiveness" under *Strickland v. Washington*, 466 U.S. 668, 683 (1984), and a claim of "state interference with the ability of counsel to render effective assistance to the accused." *Id.* (citing *United States v. Cronic*, 466 U.S. 648 (1984)). The two claims are legally and factually independent of each other; the first is based on the actions or inactions of defense counsel, the second on information that was withheld from Mr. Stripling's counsel but was necessary for his adequate defense (*i.e.*, evidence of Mr. Stripling's mental retardation). The Court will therefore discuss the two claims separately.

Actual Ineffectiveness

A. Findings of Fact

The Court adopts the findings of fact from Claims I and III as they are relevant to the analysis of this claim. The Court reiterates that it has found the testimony of Petitioner's affiants credible, has found the testimony of Professor Luckasson, Dr. Shaffer, Dr. Cooper, and Dr. Eber credible, and has found that Petitioner has established beyond a reasonable doubt that he is, in fact and in law, mentally retarded.

Trial counsel have testified that they knew there was no issue as to Petitioner's guilt. H.T. 229. However, the Georgia Legislature had recently amended O.C.G.A. § 17-7-131 to prohibit the execution of mentally retarded defendants. In their initial meetings with Petitioner, Counsel found that he appeared to "dumb as a door nail." H.T. 1169. Counsel therefore employed Boaz Harris, M.D. and John Kiehlbach Ph.D. to perform psychological evaluations. H.T. 1172; 1179. It was trial counsel's belief that Petitioner's possible mental retardation was the critical issue in the case and the center of Petitioner's defense. As counsel testified, mental retardation

was the "be all and end all . . . the thrust of the defense" H.T. 229

Even though Petitioner's intellect and his development during adolescence were critical issues, trial counsel had relatively few substantive conversations with Petitioner. Any conversations with Petitioner about his case occurred were limited in duration and conducted either in court or in the holding cell outside the courtroom. H.T.1167. Even then, counsel never discussed the Guilty But Mentally Retarded defense with Petitioner. H.T. 1168. Trial counsel did not seek any information from their client. H.T. 1160. Petitioner was never was asked to provide any background information or names of people to talk to in support of his defense. H.T. 1168-69. As a result, counsel testified they needed to look to other sources for information.

Trial counsel's investigation of Petitioner's mental retardation case consisted of talking to 4 people – Petitioner's mother,[41] grandmother, brother and girlfriend.[42] Trial counsel

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[41] The Court notes that Mr. Hauptman testified that they spoke with Ms. Mitchell "a whole lot" (H.T. 1187), while Mr. Beall recalls they spoke with her "infrequently." (H.T. 923). Similar to the testimony of Mr. Beall, Ms. Mitchell testified before this Court that the lawyers "didn't talk to me very much." H.T. 758. The Court resolves this conflict by finding that the lawyers spoke with Ms. Mitchell infrequently. This conclusion is bolstered by scant testimony elicited at trial about what counsel has conceded was the critical issue – mental retardation.

[42] Mr. Hauptman testified that he may have spoken with Petitioner's ex wife. It appears from the record, especially in light of the lack of evidence Petitioner was ever married, and the fact that Mr. Hauptman referred to the ex-wife as being the mother of Petitioner's son (H.T. 1190), that the person referred to is actually Robin Stanley, Petitioner's girlfriend.

never spoke with any of Petitioner's other relatives[43] and never sought to speak with any of Petitioner's former teachers. In fact, trial counsel testified that he "did not see it necessary" to speak with any of Petitioner's teachers (H.T. 1191) because he did not expect the teachers to remember Petitioner. H.T. 209. As noted above, trial counsel employed a psychologist and psychiatrist. They obtained prison records from two of Petitioner's prior incarcerations. They obtained Petitioner's high school records[44] and attempted to obtain his

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[43] While Mr. Hauptman testified he "believed" he spoke with Petitioner's sister, Kathy Stripling, Mr. Beall specifically does not recall speaking with her. H.T. 927. Moreover, Ms. Stripling has a specific recollection that "his lawyers never tried to talk to me." H.T. 766. Given Mr. Hauptman's equivocation, Mr. Beall's relative certainty, and Ms. Stripling's absolute assurance, the Court finds as a matter of fact that Ms. Stripling was never contacted by defense counsel prior to trial.

[44] The Court notes that trial counsel testified that they attempted to obtain all of Petitioner's school records but that some of them could not be located. However, this testimony is contradicted by the testimony of Reba Treon, the records custodian for the Atlanta City School system. Ms. Treon searched the archives of the school system and retrieved trial counsel's request for Petitioner's records. The records indicate that trial counsel asked only for Petitioner's High School Records. H.T. 735. The Court finds as a matter of fact that trial counsel asked for only Petitioner's High School Records. This conclusion is supported by the fact that current counsel produced the entire set of Petitioner's School records in these proceedings. See, H.T. 470-480. Moreover, Ms. Treon notes that current counsel requested all the records from all the schools while trial thus leading to a complete set of school records being obtained. H.T. 735.

Respondent's introduction of a copy of the subpoena trial counsel served on Elaine Lipsom (H.T. 1006) does not change the conclusion. Ms. Lipsom was the administrator of Haugerbrooks, a private school for children with learning disabilities. (H.T. 745-

Parole records. In addition, trial counsel unsuccessfully sought the disclosure of the Parole records of Petitioner's father and brother.

Trial counsel testified that they familiarized themselves with the Georgia and DSM definitions of mental retardation.[45] They met with Dr. Harris on possibly two occasions and never for more than an hour or so. (H.T. 1230).[46] Counsel met with Dr. Kiehlbach three times. The first was when Mr. Hauptman contacted him about conducting the evaluation. H.T. 1303. Mr. Hauptman testified that at that meeting nothing of substance was discussed. H.T. 1176. The second time they met was outside the jail after Dr. Kiehlbach had conducted his evaluation of Petitioner. H.T. 1303. This meeting lasted approximately 10 minutes and the results of the testing were discussed. *Id.* at 1304. The third time they met was at the courthouse before Dr. Kiehlbauch testified. *Id.* Sometime between his evaluation and his testimony, counsel called Dr. Kiehlbauch on the phone and they spoke for about 10 minutes; the thrust of the conversation was that Dr. Kiehlbauch should call Dr. Harris and discuss his findings. H.T.

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748) Current counsel has not produced any documents from Haugerbrooks and no evidence from that institution (other than the testimony of Ms. Lipsom herself) is relevant to the mental retardation issue.

[45] However, the Court notes that in testimony before this Court Mr. Beall did not know what was meant by deficits in adaptive behavior. H.T. 943.

[46] Dr. Harris' billing information indicates that he engaged in two conferences and only one entry indicates a one hour "conf attorney." The other entry merely states "conf" and indicates that meeting lasted for 1.5 hours. Mr. Hauptman testified that he met with Dr. Harris but could not recall how many times. Further, he testified unequivocally that he never met with Dr. Harris for 1.5 hours. *See* H.T. 1206.

1304-05. Counsel had no other contact with their experts before they testified.

Dr. Kiehlbauch was never prepared in general, never prepared on his testimony as it related to deficits in adaptive behavior and never provided with a copy of the Georgia statute on Guilty But Mentally Retarded. H.T.1305. Dr. Kiehlbauch recalls feeling that he was never so poorly prepared for testimony and vowed he would never go into a case so poorly prepared again. H.T. 1305-06.[47] Further, Dr. Kiehlbauch testified that he was under the impression that all evidence of deficits in adaptive functioning were going to be proved at trial through counsel's questioning of lay witnesses. As Dr. Kiehlbauch testified, "after talking with Mr. Hauptman, I understood that others would testify to adaptive deficits occurring before the age of eighteen from records or from their own experience with Mr. Stripling." H.T. 694. Thus, Dr. Kiehlbauch was wholly unprepared to testify regarding the a critical element of the defense.

In the prison records trial counsel obtained was what appeared to be an IQ score of 111 on a test called a Culture Fair. Trial counsel did not know what the Culture Fair was and prior to trial asked both Dr. Kiehlbauch and Dr. Harris about the test. H.T. 1194-65. Neither of the defense experts knew anything of the test. *Id.* Trial counsel did nothing further to learn anything about the Culture Fair until *after trial*,

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[47] The Court is aware that trial counsel testified regarding his encounters with Dr, Kiehlbauch. The Court further notes that trial counsel had no specific recollections of meetings in which they prepared Dr. Kiehlbauch. Instead, counsel testified that they must have prepared him in a certain manner because that was their practice. However, Dr. Kiehlbauch has specific recollections of the details of his meetings with counsel and the topics that were discussed therein. The Court credits the specific recall of Dr. Kiehlbauch as being accurate.

when Mr. Beall called someone, either the Attorney General or the Department of Corrections, to find out about the test.[48] H.T. 938.

The Court finds that there were many potential witnesses who had relevant and highly probative evidence of Mr. Stripling's mental retardation. Further, the Court finds that these people were readily available and willing to speak with counsel for Petitioner had they been asked. The Court finds that other than Petitioner's mother, grandmother, brother and girlfriend, trial counsel did not contact any of the potential witnesses, many of whom were in and around the area where Petitioner grew up at the time of trial. The Court further finds that a reasonable investigation would have led reasonable counsel to these witnesses and reasonable questioning would have led to a wealth of information in support of a defense of Guilty But Mentally Retarded.

The Court further finds that trial counsel only requested Petitioner's high school records. H.T. 735. Moreover, the Court finds that had trial counsel properly requested all of Petitioner's school records they would have obtained relevant and compelling evidence that Petitioner exhibited significantly subaverage general intellectual functioning that resulted in or is associated with deficits in adaptive behavior that manifested during the developmental period. *Id.*

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[48] Mr. Beall testified that he could not recall if he obtained information shortly before trial, during trial, or after trial, but at some point he learned it was not indicative of IQ. The Court finds as a matter of fact that Mr. Beall made the calls and obtained the information after trial because as he testified, if he had discovered it before or during trial he would have tried to use it, and "after trial I was concerned . . . that I couldn't have done more to discredit it." H.T. 939-40.

The Court finds that the IQ score of 111 on the Culture Fair intelligence test was a critical aspect of the State's rebuttal of the mental retardation defense. The Court further finds that Dr. Herbert Eber was in the metro Atlanta area during the time of trial and that he was accessible and known to the defense community.[49] H.T. 67. The Court finds as fact that the testimony of Dr. Eber as it pertains to the Culture Fair test administered to Petitioner is credible. Further, the Court finds that Dr. Eber's modifications to the Culture Fair make the test and resulting scores wholly unreliable and inaccurate in determining IQ. Lastly, the Court finds as fact that Dr. Eber was readily available and would have been willing to provide credible and compelling evidence in support of Petitioner's Guilty But Mentally Retarded defense has he been contacted by trial counsel.

The Court finds that there was a misunderstanding between trial counsel and the defense expert psychologist, John Kiehlbauch. Dr. Kiehlbauch, after speaking with Mr. Hauptman, thought evidence of deficits in adaptive behavior (a necessary element in the affirmative defense of Guilty But Mentally Retarded) was going to be produced at trial through lay witnesses. H.T. 694. The Court finds that Dr. Kiehlbauch believed that lay witnesses were going to testify concerning

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[49] The Court finds support for this conclusion by the Respondent's questioning of Dr. Eber. On cross-examination before this Court, counsel for Respondent elicited the fact that Dr. Eber had been contacted by counsel for Raymond Burgess at the time of Mr. Burgess' trial (which included a defense of Guilty But Mentally Retarded) in Douglas County. H.T. 67. The Court also notes that Dr. Eber testified *for the defense* in *State v. Parker*, a death penalty case tried in Douglas County in 1984. Further, prior to trial, Dr. Eber had published reports on testing done in the Georgia Prison system and simple research could have discovered this fact. H.T. 59.

their personal encounters with Petitioner and that these encounters would establish deficits in adaptive behavior. *Id.* The Court further finds that there was scant evidence produced at trial to establish deficits in adaptive behavior. Moreover, the Court finds that there was little evidence of deficits in adaptive behavior presented at trial not because of a strategic decision, but because of a misunderstanding between trial counsel and the defense experts.

B. Conclusions of Law

In order to prevail on a claim of actual ineffective assistance of counsel, Petitioner "must show both deficient performance by trial counsel and actual prejudice." *Strickland v. Washington*, 466 U.S. 668 (1984). As the Georgia Supreme Court recently noted:

> to show deficient performance [the Petitioner] must demonstrate that trial counsel's performance was not reasonable under the circumstances confronting them before and during the trial, without resorting to hindsight. [The Petitioner's] burden is high because trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement. To show actual prejudice, [the Petitioner] must demonstrate that there is a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Head v. Taylor, 273 Ga. 69, 71 (2000).

1. Deficient Performance

Trial counsel has a duty to conduct a reasonable investigation into a defense or to have a reasonable justification for failing to investigate that line of defense. Here, trial counsel testified that mental retardation was the principal defense at

trial. Thus, there can be no reason not to investigate all available means of proving that defense.

The Court finds that trial counsel failed to conduct a reasonable investigation into deficits in adaptive behavior, the second prong in the definition of mental retardation. The Court finds that trial counsel had no strategic reason for failing to conduct a reasonable investigation into this area of the defense. Moreover, the Court finds that counsel's failure left his expert psychologist, Dr. Kiehlbauch, with virtually no basis upon which to conclude that Mr. Stripling met the definition of mental retardation. That the failure is attributable to a misunderstanding between trial counsel and the defense experts: Dr. Kiehlbauch believed that trial counsel were planning to fill this gap in the proof with the testimony of lay witnesses. The Court finds that this misunderstanding was attributable to trial counsel, and that counsel's failure to present either expert or lay witnesses to testify to all aspects of the definition of mental retardation was unreasonable in this case, where the main defense was Petitioner' retardation. Thus, the Court finds that trial counsel's failure to investigate adequately the issue of deficits in adaptive behavior was conduct that fell below an objective standard of reasonableness.

The Court also finds as a matter of law that it was an unprofessional error to request only the high school records of Petitioner, especially when one of the criteria for a finding of mental retardation is onset during the developmental period (prior to age eighteen). The Court finds that had trial counsel acted reasonably, they would have requested all of Petitioner's school records. Further, the Court finds that a reasonable request would have resulted in the City of Atlanta School System providing a complete copy of Petitioner's school records rather than just the high school records obtained as a result of trial counsel's inadequate request. Finally, the Court finds that those records (which are in

evidence in this proceeding) would have revealed both significantly subaverage general intellectual functioning and deficits in adaptive behavior that manifested prior to age 18.

The Court also finds that trial counsel acted unreasonably in failing to further investigate the Culture Fair test. As stated above, Mr. Stripling's score of 111 on the Culture Fair test reported in the prison records (which trial counsel offered into evidence as a defense exhibit) was the only objective evidence at trial suggesting that Mr. Stripling's IQ might be above 70. Reasonable counsel would have anticipated that the State would use this test score to argue that Petitioner is not mentally retarded. Reasonable counsel would have done more to investigate the Culture Fair than to ask their experts – especially after the experts reported that they knew nothing about the test. Reasonable counsel would have asked the defense experts to conduct some research to determine the validity and reliability of the Culture Fair. The Court finds that minimal research would have led trial counsel to the Buros Mental Measurement Yearbook, which says of the Culture Fair:

> "The manuals are woefully inadequate. One must not be overwhelmed by the array of references cited in the text of the manuals. The necessity and sometimes the impossibility of tracking down each citation also makes it hard on a conscientious reviewer. The necessary research to support the claims made for the test either has not been done or has not been thoroughly and clearly presented in the manuals. ***One is forced to suspend endorsement of the test and of its underlying theory.***" H.T. 114 (emphasis added).

Further, Buros indicated that the Culture Fair ceased to be published in 1970, a full 10 years prior to its administration to Petitioner.

2. Prejudice

The Court finds as a matter of law that but for trial counsel's unprofessional errors, there is a reasonable probability that the outcome of Petitioner's trial would have been different in that there is a reasonable probability that he would have been found Guilty But Mentally Retarded. As noted in the Court's analysis of Claim I, Petitioner has proven to this Court, beyond a reasonable doubt, that he is mentally retarded. This Court based that conclusion on new evidence presented for the first time in these habeas corpus proceedings. Included in that new evidence is:

* a complete copy of Petitioner's Atlanta City School records which include IQ scores in 3rd and 5th grades of 64 and 52 respectively, H.T. 474;
* the testimony of Dr. Herbert Eber indicating that the 111 Culture Fair IQ score is wholly unreliable and not relevant to a determination of mental retardation H.T., 716-730; and
* a wealth of new information establishing that Petitioner exhibited deficits in adaptive behavior during the developmental period, H.T. 736-840.

The Court finds that each of the errors of trial counsel has prejudiced Petitioner, in that had trial counsel acted reasonably, counsel would have been able to refute every aspect of the State's case against the defense of retardation. The State's arguments at trial, and the evidence that trial counsel could have (but did not) present in response, are summarized below.

i. Deficits In Adaptive Behavior

The State pointed out that IQ scores alone are not enough to establish mental retardation under O.C.G.A. § 17-7-131, and that the defense did not present any significant evidence of deficits in adaptive behavior. (Tr. 2462; 2536). However,

had trial counsel conduced a reasonable investigation they would have uncovered a wealth of information clearly establishing deficits in adaptive behavior. This evidence was not cumulative of evidence presented at trial, but was necessary to establish an essential element of the defense of Guilty But Mentally Retarded. Current counsel has established both deficient performance and prejudice in this regard through the affidavit testimony contained in Petitioner's Exhibits 9 through 33. These witnesses were available and would have testified had they been contacted. However, trial counsel failed to conduct a reasonable investigation which would have led them to these witnesses. But for counsel's failure in this area there is a reasonable probability that Petitioner's jury would have found him Guilty But Mentally Retarded and Petitioner would have been sentenced to life in prison.

ii. Malingering

The State argued that Petitioner was malingering when he scored a 64 on the WAIS administered by Dr. Kiehlbauch because he was "staring down the barrel of the electric chair" when he took that test. Had counsel conducted a reasonable investigation, including making a reasonable request for **all** of Petitioner's school records, trial counsel would have been able to completely refute this argument. The school records established that Petitioner scored a 64 on an IQ test in 3rd grade and a 52 on an IQ test in 5th grade. No one contends that Mr. Stripling was malingering in grammar school. In fact, as Professor Luckasson testified, people do not want to be considered slow and will do whatever they can to hide the fact that they are slow. The Court finds that the childhood IQ scores in the school records show that Mr. Stripling's adult IQ scores are accurate, and belie any assertion of malingering.

Thus, but for trial counsel's failure to obtain all of Petitioner's school records, there is a reasonable probability that the outcome of Petitioner's trial would have been different in

that Petitioner would have been found Guilty But Mentally Retarded and sentenced to life in prison.

iii. Recent Fabrication

The State argued that Petitioner's mental retardation was just a trick to keep him out of the electric chair. (See Tr. 2472). In essence, the State argued that Petitioner's defense of mental retardation was a "recent fabrication" and should not be believed.

The school records that the Court has already determined trial counsel should have obtained refute the allegation of recent fabrication. In addition, all of the lay witnesses and teachers that the Court has already determined were available, could have provided a wealth of information that Petitioner's intellectual problems had been lifelong. Thus, the Court finds that but for counsel's unprofessional errors in failing to adequately investigate the facts, Petitioner would have been able to refute the State's assertion of recent fabrication.

iv. Depression

The State argued that Petitioner's score of 64 on the WAIS-R was artificially low because of depression caused by (1) a recent letter from his girlfriend indicating that her child was not his; and (2) the fact that Petitioner was in jail facing the prospect of a death sentence. (Tr. 2450-52). The school records that should have been obtained indicating Petitioner's childhood IQ scores, and the evidence from lay witnesses and teachers that indicated Petitioner suffered from symptoms of mental retardation since early childhood, all establish that depression was not the cause of Petitioner's low adult IQ scores. Thus, had counsel acted reasonably in their defense of Petitioner, the State would not have been able to argue (with any degree of credibility) that depression artificially deflated Petitioner's IQ score.

v. The Culture Fair

The State argued that Petitioner was not mentally retarded because he scored a 111 on a Culture Fair test administered to him by the Georgia Department of Corrections. (Tr. 2472). Had trial counsel conducted a reasonable investigation they would have consulted Dr. Eber, who would have told the jury that the Culture Fair is wholly unreliable as an indicator of IQ. Dr. Eber also would have told the jury (and Petitioner's experts) about his modifications to the test, which completely destroyed its validity and reliability as a measure of intellectual functioning. Had trial counsel conducted a reasonable investigation into the only objective evidence that Petitioner was not mentally retarded, they would have found Dr. Eber and would have thereby been able to destroy any reliance upon the Culture Fair Score of 111.

Each of trial counsel's errors individually requires reversal in that but for each independent error, there is a reasonable probability that Petitioner would have prevailed on his Guilty But Mentally Retarded defense. However, even if each error is not prejudicial in its own right, the Court finds as a matter of law that the cumulative effect of all of counsel's unprofessional errors prejudiced Petitioner. The Court finds that but for counsel's failure to conduct a reasonable investigation, failure to request all of Petitioner's school records, failure to find, interview and call Dr. Eber as a defense witness, and failure to interview a host of family members, elementary school teachers, friends, neighbors and other acquaintances, the result of the trial might have been different. The Court concludes as a matter of fact and law that but for trial counsel's unprofessional errors, there is a reasonable probability Petitioner would have been found Guilty But Mentally Retarded and therefore not eligible to be executed.

Further, the Court finds as a matter of law that the Federal Constitution requires a cumulative analysis of all constitutional errors. Thus, the Court concludes that the cumulative

effect of all errors rendered Petitioner's trial on the issue of mental retardation fundamentally unfair.

So finding, the Court vacates Petitioner's death sentence and orders that Petitioner be re-tried on the issue of mental retardation within a reasonable time.

State Interference with the Ability of Counsel to Render Effective Assistance

A. Findings of Fact

The Court adopts its previous findings of fact as they are relevant to the analysis of this claim. The Court reiterates that it has found (1) that the State violated *Brady* by withholding material evidence of Petitioner's mental retardation; (2) that Petitioner was prejudiced by the State's withholding of that evidence, in that there is a reasonable likelihood that if the evidence had not been withheld, the result of the trial would have been different, and (3) that in this Court, with the benefit of the evidence that the State wrongfully withheld, Petitioner has established beyond a reasonable doubt that he is mentally retarded.

In addition, the Court now finds that both the prosecution's withholding of Dr. Cooper's report and notes, and the failure of the trial court to disclose the contents of the Parole files, significantly inhibited and curtailed Petitioner's trial counsel's ability to render effective assistance of counsel.

B. Conclusions of Law

The Georgia Supreme Court has held that when the State violates *Brady v. Maryland*, 373 U.S. 83 (1963), a habeas petitioner can perfect a claim of ineffective assistance by showing that "trial counsel's ability to render effective assistance was curtailed by the State's failure to disclose" evidence and that the petitioner suffered prejudice because his attorney was rendered ineffective. *Byrd v. Owen*, 272 Ga. 807, 812, 536 S.E.2d 736, 739-40 (2000). A claim of ineffec-

tive assistance based on the standard announced in *Byrd* can succeed even if the Petitioner does not show that counsel's personal mistakes constituted actual ineffectiveness as defined by *Strickland*. A *Byrd* claim does not depend on the actions of the defense counsel; scrutiny rests on the state's flouting of *Brady*. By withholding Mr. Stripling's parole file and Dr. Cooper's reports and notes in violation of *Brady*, the State rendered Mr. Stripling's attorneys prejudicially ineffective.

Mr. Stripling's parole file contained reports indicating that Mr. Stripling had been diagnosed as mentally retarded at age 17 in prison, and that several state employees believed Mr. Stripling to be mentally retarded and questioned the validity of his Culture Fair test score. As the Court has found, the withholding of this evidence prejudiced the Petitioner. If Petitioner's attorneys had access to the parole file, they could have used that evidence to rebut the State's charges of malingering, depression, and recent fabrication. Counsel also could have given the parole records to the defense experts, who could have testified to the facts revealed in the records as the basis for their opinions. The records could have been used to impeach the State's experts. Finally, counsel could have subpoenaed the authors of the reports to testify at trial. Although the authors were not themselves experts qualified to give a diagnosis, their observations of Mr. Stripling's behavior would have provided a sound basis for Dr. Kiehlbauch's diagnosis by providing evidence of Mr. Stripling's low intellectual functioning, adaptive behavior deficiencies and the childhood onset of these conditions. The Court finds that such evidence could easily have led the jury to a different verdict.

Similarly, because the State withheld Dr. Cooper's report and notes, Mr. Stripling's attorneys were denied evidence that one of the prosecution's experts believed that Mr. Stripling was of low intellectual functioning. Had Mr. Stripling's

attorneys seen Dr. Cooper's report and notes they could have called Dr. Cooper to testify, demonstrating to the jury that a member of the State's diagnostic team believed that Mr. Stripling could very well be mentally retarded. Perhaps more importantly, armed with Dr. Cooper's testimony, Mr. Stripling's attorneys could have impeached the State's lead witness, Dr. Youngleson. They could have shown that (as this Court has found) Dr. Youngleson did no detailed evaluation of Petitioner's intelligence, because no one had informed Dr. Youngleson that mental retardation was the issue in the case. Had the jury known this, they could very well have discredited Dr. Youngleson's "guesstimate" of IQ and found Mr. Stripling to be mentally retarded.

Thus, the Court finds that the State's *Brady* violations prevented Mr. Stripling's attorneys from developing and presenting evidence that would very likely have led to a different verdict, thus requiring reversal of Mr. Stripling's death sentence under *Byrd*. Therefore, pursuant to *Byrd*, the Court vacates Petitioner's death sentence and orders that Petitioner be re-tried on the issue of mental retardation within a reasonable time,

IV. Whether the Prosecutor Made Improper Statements During Closing Arguments Referring to the Effect of a Finding of Guilty but Mentally Retarded

In Claim XXVIII of his Amended Petition for Writ of Habeas Corpus [misnumbered as Claim XVIII in the actual Petition], Petitioner argues that he was denied a fundamentally fair trial because the prosecutors impermissibly injected considerations of punishment into the guilt-innocence phase of the trial. For the reasons stated in the Court's Conclusions of Law on this subject, the Court finds that this claim is properly before the Court.

A. Findings of Fact

The Court makes the following specific findings of fact in addition to those findings discussed below:

* During Petitioner's trial, the prosecutors made many statements to the effect that if the defendant was found to be guilty but mentally retarded he would not be eligible for the death penalty.

* In this habeas proceeding, the State has not contested the fact that the statements referenced above violate the rule of *Patillo v. State*, 262 Ga. 259, 261, 417 S.E.2d 139, 141 (1992).

* *Patillo* was decided after the completion of Petitioner's trial and direct appeal in 1991.

* This habeas corpus petition is the first opportunity that Petitioner has had to raise this claim.

Among the relevant statements made by the prosecutors are the following quotes from the closing arguments at Petitioner's trial:

(1) That man is looking straight down the barrel of the electric chair. You don't think he's going to pull some wrong answers on an IQ test if he thinks it will save his life? (Tr. (6/30/89) 2458-59).

(2) Isn't it peculiar to you that Alphonso Stripling has been in and out of institutions all his life and he has never ever, ever, ever, ever, ever been treated for mental illness in his whole life even until he is looking down the barrel of the electric chair? . . . He hadn't received no treatment for mental retardation, . . . Isn't it a peculiar coincidence that we've suddenly discovered that Alphonso was mentally ill and mentally retarded two months before he goes on trial for the electric chair? . . . Doesn't it make you understand

and know in your heart that this is a lawyer trick and a lawyer game designed to keep this man out of the electric chair? (Tr. (6/30/89) 2472-74).

B. Conclusions of Law

The Respondent argues that this claim is barred and that the holding of *Patillo* is not applicable to Petitioner's case because of the pipeline rule announced in *Taylor v. State*, 262 Ga. 584, 586, 422 S.E.2d 430, 432 (1992). As to the Petitioner's failure to raise this claim at trial, the Court concludes that there is cause and prejudice sufficient to overcome the procedural bar because *Patillo* was decided after Petitioner's direct appeals were exhausted and announced a new rule of law. As to the pipeline rule for retroactivity, the Court concludes that *Taylor v. State* is inapposite because the rule of *Patillo* is one of substantive rather than procedural law. The pipeline rule announced in *Taylor* applies only to new procedural rules. *See Taylor*, 262 Ga. at 586. Because *Patillo* creates new substantive rights and responsibilities, it must be applied retroactively to Petitioner's case. *See, e.g., Luke v. Battle*, ___ Ga. ___, 565 S.E.2d 816, 819 (2002). The Court further concludes that regardless of the approprite rule of retroactivity, it would violate fundamental fairness to deny Petitioner the benefits of *Patillo*. That is because the rule of *Patillo* expressly applies to those convicted prior to 1989, the year in which O.C.G.A. §17-7-131 was enacted and applies implicitly to all defendants after *Patillo* was decided in 1994. It would violate the dictates of justice and fairness to withold this constitutional right from only those defendants whose convictions and direct appeals were exhausted during a narrow four year window.

1. Because the prosecutors repeatedly emphasized to the jury that a verdict of guilty but mentally retarded would make Petitioner ineligible for the death penalty, the verdict must be vacated pursuant to *Patillo v. State*

The Court concludes that the statements made by the prosecution during closing arguments are plain error under the rule set up by *Patillo v. State*, 262 Ga. 259, 261, 417 S.E.2d 139, 141 (1992). These statements impermissibly introduce the effect of a finding of mental retardation into the jury's decision-making process and encourage a verdict based not on the facts, not on the facts, but on the basis of passion. As a result of this serious constitutional violation, the Court concludes that it can have no confidence in the verdict at trial. Therefore, the Court vacates Petitioner's death sentence and orders that Petitioner be re-tried on the issue of mental retardation within a reasonable time.

V. Whether Requiring Defendants to Prove Mental Retardation Beyond a Reasonable Doubt Violates the Due Process Clause

In Claim V of his Amended Petition for Writ of Habeas Corpus, Petitioner argues that he was denied a fundamentally fair trial under the Fourteenth Amendment because, pursuant to O.C.G.A. §17-7-131, he was required to prove his mental retardation beyond a reasonable doubt. Although the Georgia Constitution has prohibited execution of mentally retarded people since 1989 (see *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989)), the United States Supreme Court has only very recently held that mentally retarded people have a right to be free from execution under the Eighth Amendment to the United States Constitution (*see Atkins v. Virginia*, 122 S. Ct. 2242 (2002)). O.C.G.A. § 17-7-131 provides the procedure by which mentally retarded people must enforce their right to be free from execution under the Georgia Constitution. *Atkins* did not announce any procedural rules, but left

the determination of such rules in the first instance to the respective states. *See Atkins*, 122 S. Ct. at 2350 n. 24. Petitioner alleges that the procedure laid out in O.C.G.A. § 17-7-131, specifically the requirement that defendant prove his mental retardation beyond a reasonable doubt, violates the due process clause as it applies to Petitioner's rights under the Georgia and United States Constitutions. For the reasons stated in the Court's Conclusions of Law on this subject, the Court finds that this claim is properly before the Court.

A. Findings of Fact

The Court makes the following specific findings of fact in addition to those findings discussed below:

* During Petitioner's trial the jury was instructed that Petitioner was required to prove mental retardation beyond a reasonable doubt.

* There is a reasonable probability that the evidence presented by Petitioner at trial was sufficient to prove his mental retardation by at least a preponderance of the evidence.

* By requiring defendants to prove their mental retardation beyond a reasonable doubt, O.C.G.A. § 17-7-131 creates a significant risk that people who are actually mentally retarded will not be able to, or for various reasons will fail to, satisfy the burden necessary to prove mental retardation and thus will be executed.

* Because of the nature of proof required, the issue of mental retardation is particularly ill suited to the requirement of proof beyond a reasonable doubt.

* Because of common public misconceptions about mental retardation, this issue is particularly ill suited to the requirement of proof beyond a reasonable doubt.

* Due to their limited mental capabilities, people with mental retardation are often unable to assist their lawyers fully in preparing their defense.

* People with mental retardation often attempt to conceal their condition in order to avoid stigmatization.

* Because proof of mental retardation requires evidence of onset during the person's developmental period (among other factors), it would be highly unlikely that an individual could successfully malinger or fake mental retardation.

* Among those states that prohibited the execution of mentally retarded people prior to *Atkins v. Virginia*, Georgia is the only one that requires proof of mental retardation by a standard as high as beyond a reasonable doubt.

At the close of the guilt-innocence phase of Petitioner's trial, the court instructed the jury on the issue of mental retardation using the words of O.C.G.A. § 17-7-131:

> The Defendant may be found guilty but mentally retarded if the jury finds beyond a reasonable doubt that the Defendant is guilty of the crime charged and was mentally retarded at the time of the commission of the crime.

(Tr. (6/30/89) 2582). As the Georgia Supreme Court has held, "the plain language of [O.C.G.A.17-7-131] requires that the defendant prove his mental retardation beyond a reasonable doubt." *Burgess v. State*, 264 Ga. 777, 789-90, 450 S.E.2d 680, 694 (1994).

The Court adopts the findings of fact contained under Claim I as they are relevant to the analysis of this claim. Having reviewed the evidence presented at trial, the Court finds that there is a reasonable probability that a jury presented with such evidence would find that the Petitioner had

proven his mental retardation by at least a preponderance of the evidence.

Because proof of mental retardation must come in the form of expert medical testimony regarding the intellectual capabilities of a defendant, it is necessarily a source of contention. *See, e.g.*, James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. at 487-88 (discussing the difficult issues of evidence facing courts making a determination of mental retardation). Even the arguably objective evidence provided by IQ testing can become the subject of debate. *See, e.g.*, Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 74-75 (1996) (discussing professional disagreement about the reliability of IQ test scores). Furthermore, research has demonstrated that people who are mentally retarded are often not able to fully participate in the adversarial process or to assist their lawyers in preparing an adequate defense. *See, e.g.*, James Ellis & Ruth Luckasson, 53 GEO. WASH. L. REV. at 427-32 (discussing the impact that various common characteristics of mental retardation have on legal representation). Finally, people who are mentally retarded often attempt to cover up their mental condition in order to appear more intellectually competent than they really are. *See, e.g.*, Keyes, 22 MENTAL & PHYSICAL DISABILITIES L. REP. at 531, 536 ("People with mild mental retardation often become quite adept at making others believe that they function on a higher level than is actually the case."); James Ellis & Ruth Luckasson, 53 GEO. WASH. L. REV. at 431 ("many [mentally retarded] individuals will go to great lengths to hide their disability"). All of these factors exacerbate the already high burden imposed upon mentally retarded people under O.C.G.A. § 17-7-131.

Among the eighteen states that statutorily banned execution of the mentally retarded before *Atkins v. Virginia*, most

require defendants to prove mental retardation only by a preponderance of the evidence.[50] A few states require "clear and convincing" proof of mental retardation,[51] and in three States and the federal government, the requisite burden is unclear.[52] In four states, reliable IQ scores in the mentally retarded range create a rebuttable presumption that the defendant is mentally retarded, thus placing the burden on the prosecution.[53] The Court does not have data on procedures adopted by States in response to *Atkins*, but is not aware of any that has imposed a burden of proof as high as beyond a reasonable doubt upon defendants attempting to prove mental retardation.

B. Conclusions of Law

The Respondent argues that this issue has been waived because the Petitioner did not raise it on direct appeal. The Court notes that both *Cooper v. Oklahoma*, 517 U.S. 348

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[50] *See* Ark. Code Ann, § 5-4-618; Conn. Gen. Stat. § 53a-46a; Md. Code Ann., Art. 27 § 412; Mo. Rev. Stat. § 565.030; Neb. Rev. Stat. Ann. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1; N.Y. Crim. Proc. Law § 400.27; Tenn. Code Ann. § 39-13-203; Wash. Rev. Code Ann. § 10.95.030.

[51] See Ariz. Rev. Stat. § 13-703.02; Colo. Rev. Stat. § 16-9-402(2); Fla. Stat. Ann. § 921.137; Ind. Code Ann. § 35-36-9-4; N.C. Gen. Stat. § 15A-2005.

[52] *See* 18 U.S.C. § 3596(c); Kan. Crim. Code Ann. § 21-4623; Ky. Rev. Stat. Ann. §§ 532.140, 542.130, 532.135; S.D. Codified Laws § 23A-27A-26.1. In Kentucky, it appears that anyone who demonstrates an IQ below 70 will be ineligible for the death penalty under their statute. *See Woodall v. Commonwealth*, 2001 WL 963969 *3 (Ky. Aug. 23, 2001); *accord Skaggs v. Parker*, 235 F.3d 261, 273 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 322 (2001).

[53] See Ariz. Rev. Stat. § 13-703.02; Ark. Code Ann. § 5-4-618; Neb. Rev. Stat. Ann. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1.

(1996), and *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), the two cases on which Petitioner bases this claim, were decided after Petitioner had exhausted his direct appeal. Because Petitioner relies on new law to support a claim that, if successful, would require reversal of his death sentence, the Court concludes that Petitioner has demonstrated cause and prejudice sufficient to overcome the procedural bar. *See, e.g., Turpin v. Christenson*, 269 Ga. 226, 229, 497 S.E.2d 216, 221 (1998). Furthermore, even absent cause and prejudice, the Court concludes that the procedural bar for this claim would be overcome in order to avoid a miscarriage of justice. *See* Part I of this order.

1. O.C.G.A. § 17-7-131 violates the Fourteenth Amendment

"The function of a standard of proof, as that concept is embodied in the due process clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Cruzan v. Director, Missouri Dep't. of Health*, 497 U.S. 261, 282 (1990) (*quoting Addington v. Texas*, 441 U.S. 418, 423 (1979)). "But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'" *Cruzan*, 497 U.S. at 283 (*quoting Santosky v. Kramer*, 455 U.S. 745, 755 (1982)). Because the burden of proof that is applied may be decisive of an issue at trial (*see, e.g., Speiser v. Randall*, 357 U.S. 513, 525 (1958)), the Constitution requires that the burden of proof allocate the risk of error between the parties in a manner that is fundamentally fair in light of the interests that each party has at stake. *See, e.g., Cooper*, 517 U.S. at 365-66.

The test for determining whether a burden of proof violates the due process clause was laid out in *Cooper v. Oklahoma*, 517 U.S. 348 (1996).[54] In that case, the Supreme Court held that when performing a federal due process analysis of a State burden of proof that must be met in order to enforce a constitutional right, a court must consider three factors: historical practice, contemporary practice, and fundamental fairness. *Id.* at 355. If, in light of these three factors, the court determines that the burden of proof violates a principle of fundamental fairness, it must hold that it is unconstitutional under the Fourteenth Amendment. *Id.*[55]

A. Historical Evidence

Because the classification "mentally retarded" is a product of modern medical science, there is little historical evidence on this issue. Although the common law notion of idiocy "bears some similarity to the modern definition of mental retardation," idiocy generally included only what we would now consider severe or profound retardation. *Penry v.*

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[54] There is a dispute between the parties over the interpretation of *Cooper*. The Court finds that the Respondent's characterization of the case is incorrect and that the following description captures the holding of *Cooper*.

[55] *See generally Vitek v. Jones*, 445 U.S. 480 (1980) ("Once a State has granted . . . a liberty interest, . . . due process protections are necessary 'to insure that the **state-created right** is not arbitrarily abrogated.' . . . '[T]he determination of whether [a person qualifies for the right] becomes critical, and the minimum requirements of procedural due process appropriate for the circumstance must be observed.' These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.") (*citing Wolff v. McDonnell*, 418 U.S. 539 (1974) (emphasis added)).

Lynaugh, 492 U.S. 302, 331-33 (1989) (citing James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 417 (1985). On whole, the evidence of historical practice is indeterminate.

B. Contemporary Practice

As noted above, among the States that prohibited execution of the mentally retarded prior to *Atkins*, Georgia is the only one that requires proof of mental retardation beyond a reasonable doubt. Thus, the weight of contemporary practice militates against this extreme burden of proof.

C. Fundamental Fairness

For a defendant, the difference between a verdict of "guilty" and one of "guilty but mentally retarded" is the difference between life and death. Under the United States Constitution, a determination that affects a life or death decision must be accompanied by a high degree of certainty. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1982) ("[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability . . . [because] execution is the most irremediable and unfathomable of penalties . . ."); *Murray. v. Giarratano*, 492 U.S. 1, 8-9 (1989) ("[t]he finality of the death penalty requires a greater degree of reliability when it is imposed") (plurality op. of Rehnquist, C.J,) (internal quotation marks omitted); *Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("[t]o insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination") (internal quotation marks omitted); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (striking down "a statute that . . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" because "[w]hen the choice is between life and death, that risk is unacceptable and incompatible with the

commands of the Eighth and Fourteenth Amendments."); *Gardner v. Florida*, 430 U.S. 349, 357-589 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion") (plurality op. of Stevens, J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *accord Cunningham v. Zant*, 928 F.2d 1006, 1012 (11th Cir. 1991); *Lesko v. Lehman*, 925 F.2d 1527, 1554-55 (3d Cir. 1991); *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987).

When defendants are required to prove mental retardation beyond a reasonable doubt, it is a matter of common sense that a certain percentage of people who are actually mentally retarded will be unable to prove their condition. This failure may be the result of an abnormality in their record such as an aberrational or misreported IQ score or a specific area in which they have shown particular adaptive capacity. It may also be the result of the quality of their defense, especially as it is affected by the very condition they are attempting to prove. It is worth noting that one of the Supreme Court's reasons for its ruling in *Atkins* is that mentally retarded people are not often able to participate fully in the adversarial process and thus receive less than a fully adequate defense. Whatever the underlying cause, these mentally retarded people will fail to prove their retardation and will therefore be sentenced to death in violation of the Eighth Amendment and despite the fact that they are "innocent of the death penalty."

This common-sense conclusion is borne out in Petitioner's case. While the Court is now faced with an overwhelming body of evidence demonstrating that Petitioner is

mentally retarded by any standard, at trial the evidence of mental retardation was substantially less convincing. There are several reasons that the evidence at trial was less convincing, and some of those reasons provide the basis for Petitioner's other claims as described in this order. Even so, if the burden of proof at trial had been lower there is a reasonable probability that Petitioner would have been found to be mentally retarded.

The Court concludes that it is fundamentally unfair to require people who are mentally retarded to bear such a high burden and to carry such a high risk of wrongful determination when the cost of error is their life. The risk of error in the determination of mental retardation must, at the very least, be shared more evenly by the State. The Court is reminded of the fundamental principle of due process captured by Blackstone, "It is better that ten guilty persons escape than one innocent person suffer." 4 W. Blackstone, The Laws of England, 358 (T. Wait & Co.).

The analysis under *Cooper* is clear; it is fundamentally unfair and therefore violates the Fourteenth Amendment to require a defendant to meet the beyond a reasonable doubt burden of proof in order to assert his rights under *Atkins v. Virginia* and the Eighth Amendment. Therefore, the Court orders that Petitioner's death sentence be vacated and directs that a new trial on the issue of mental retardation be carried out in a reasonable time and employing a constitutional burden of proof.[56]

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[56] Because the Court grants the requested relief on this basis, it has not reached the other three arguments raised by Petitioner asserting that the burden of proof at trial was unconstitutional. *See* Pet'r Br. on Burden of Proof. The Court defers judgment on those three arguments along with the other claims so deferred in Part VI of this order.

2. Requiring defendants to prove mental retardation by a preponderance of the evidence is valid under the Fourteenth Amendment

Having found that the burden of proof under O.C.G.A. § 17-7-131 is unconstitutional, the Court is faced with the question what burden of proof should Petitioner be required to meet during the new trial on mental retardation. As an initial matter, the Court finds that requiring the defendant rather than the State to carry the burden of proof is acceptable under the Fourteenth Amendment. *See, e.g., Cooper*, 517 U.S. at 366 ("while the difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of [the right], it does not justify the additional onus of an especially high standard of prof.").

In *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989), the Supreme Court of Georgia was faced with a situation in which a defendant sought to enforce his right under the Georgia Constitution, but the statutory procedure established by O.C.G.A. § 17-7-131 was not applicable. The Supreme Court established a non-statutory procedure for proving mental retardation and held that persons using such a procedure must prove their mental retardation by a preponderance of the evidence. *See id.* Although not determinative, the Court finds the Supreme Court's decision useful in determining what burden of proof should be applied here.

The appropriateness of the Supreme Court of Georgia's choice in *Fleming* is corroborated by the United States Supreme Court's decision in *Cooper*, 517 U.S. 348. In that case the Court held that, pursuant to the Fourteenth Amendment, a defendant could not be required to prove incompetence to stand trial by any burden of proof higher than a preponderance of the evidence. *See, id.* Although a competency determination is not completely analogous to a determination of mental retardation, the types of evidence involved and the importance of the procedure for the defendant are in many

ways similar.[57] The Court concludes that it is appropriate under the Fourteenth Amendment to require defendants to prove mental retardation by a preponderance of the evidence. The Court therefore directs that at the new trial on Petitioner's mental retardation he be required to prove his mental retardation by a preponderance of the evidence.

VI. Other Claims

In Count 15 of the Amended Petition, Petitioner asserts that electrocution is an unconstitutional method of execution under both the Federal and Georgia Constitutions. Because the Georgia Supreme Court has held that electrocution is unconstitutional under the Georgia Constitution and that all otherwise-constitutional death sentences in this State will be carried out through lethal injection (*see Dawson v. State*, 274 Ga. 327 (2001)), this Count is denied as moot.

Because this Court has ordered relief on Counts 1, 2, 3, 5 and 28 of Petitioner's Amended Petition For Writ of Habeas Corpus, this Court has not reached the remaining Counts of that Petition, specifically Counts 6-14, 16, 20, 22-25, 30, 33, 34, 39, 41, 44-46, 48 with respect to trial and sentencing, Counts 32 and 43 with respect to trial, Counts 4, 18, 19, 21, 35, 36, 37, 38, 42 and 47 with respect to sentencing, and Counts 17, 26, 27, 29, 31, and 41 with respect to the competency hearing. Therefore, the Court defers ruling on those claims not specifically considered and ruled upon in this order. *Cf., e.g., Zant v. Moon*, 264 Ga. 93, 100, 440 S.E.2d 657

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[57] Furthermore, the State's interest in the competency determination is much higher than its interest in a determination of mental retardation because the first exempts the defendant from prosecution while the second only exempts him from capital punishment. This would indicate that, if anything, the appropriate burden for mental retardation should be more in favor of the defendant than that for competency.

(1994) (remanding to habeas court for further proceedings on deferred claims after overruling decision based on a subset of claims raised in habeas corpus petition).

ENTER: October 17, 2002

/s/ CLARENCE F. SEELIGER
Clarence F. Seeliger
Judge, Stone Mountain Judicial Circuit
Presiding in Butts County Superior Court

SUPREME COURT OF GEORGIA

HEAD

v.

HILL.

HILL

v.

HEAD

Nos. S03A0559, S03X0560.

Oct. 6, 2003.

Reconsideration Denied Nov. 7, 2003.

CARLEY, Justice.

In a trial held in July and August of 1991, Warren Lee Hill was convicted and sentenced to death for the murder of Joseph Handspike. This Court unanimously affirmed the conviction and death sentence in March of 1993. *Hill v. State*, 263 Ga. 37, 427 S.E.2d 770 (1993).

Hill filed a petition for writ of habeas corpus on April 14, 1994, alleging that he was mentally retarded. The habeas court, erroneously invoking the procedure set forth in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989), granted a limited writ ordering a jury trial in the original trial court on the question of mental retardation, with Hill bearing the burden of proof under the "preponderance of the evidence" standard. This Court reversed, holding that, although he could pursue relief under the "miscarriage of justice" provision of the habeas corpus statute by attempting to prove to the habeas court itself under the "beyond a reasonable doubt" standard that he was mentally retarded, Hill was not entitled to a jury trial under the preponderance of the evidence standard because he had been tried after the effective date of the statute providing defendants the opportunity to prove their men-

tal retardation at trial. *Turpin v. Hill*, 269 Ga. 302, 498 S.E.2d 52 (1998).

The habeas court found on remand, in an order filed on May 16, 2002, that Hill succeeded in proving beyond a reasonable doubt that he had significantly subaverage intellectual functioning, but the habeas court further found that Hill failed to prove beyond a reasonable doubt the existence of impairments in adaptive behavior. Consequently, the habeas court concluded that Hill had failed to prove his alleged mental retardation beyond a reasonable doubt. See OCGA § 17-7-131(a)(3) (defining mental retardation). On September 20, 2002, the habeas court filed a supplemental order, upon the Warden's motion, denying Hill's remaining claims. On November 22, 2002, the habeas court granted a motion for reconsideration filed by Hill and once again granted a limited writ ordering a jury trial on the issue of mental retardation, with Hill bearing the burden of proof by a preponderance of the evidence.

For the reasons set forth below, we reverse the habeas court's order granting the motion for reconsideration of the mental retardation claim in Case Number S03A0559, and we affirm the habeas court's denial of relief to Hill on other grounds in Case Number S03X0560.

I. Factual Background

At the time of the murder of Joseph Handspike, both he and Hill were inmates at the Lee County Correctional Institute. Hill was serving a life sentence for murdering his former girlfriend by shooting her numerous times with a 9-millimeter handgun. On the morning of August 17, 1990, as Mr. Handspike slept, Hill removed a two-by-six board that served as a sink leg in the prison bathroom and forcefully beat the victim numerous times with the board about the head and chest as onlooking prisoners pleaded with him to stop. A prison guard witnessed the attack and testified at trial. Sev-

eral prisoners testified that Hill mocked the victim as he beat him. The victim arrived at the hospital in a coma and died there.

II. Alleged Mental Retardation

"Mentally retarded" under Georgia law "means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." OCGA § 17-7-131(a)(3). Death penalty defendants tried on or after July 1, 1988 are entitled to present evidence of retardation to the jury at the guilt/innocence phase of their trials and, if found beyond a reasonable doubt to be retarded, to avoid a death sentence. OCGA § 17-7-131(j). At his trial, Hill presented evidence of his intellectual slowness, but his psychological expert testified that Hill had an intelligence quotient of 77 and was not mentally retarded. Hill did not request that the jury be charged on a "guilty but mentally retarded" verdict.

Because Hill did not seek a jury determination of his alleged mental retardation at trial, that issue is procedurally defaulted. OCGA § 9-14-48(d); *Turpin v. Todd*, 268 Ga. 820, 824(2)(a), 493 S.E.2d 900 (1997); *Black v. Hardin*, 255 Ga. 239, 240(4), 336 S.E.2d 754 (1985). Nevertheless, this Court held in the previous appeal in this case that the execution of a mentally retarded person whose retardation was not considered at trial would constitute a miscarriage of justice. *Turpin v. Hill*, *supra* at 303(3)(b), 498 S.E.2d 52. Accordingly, this Court ordered the habeas court to consider Hill's claim of mental retardation "without intervention of [a] jury" under the beyond a reasonable doubt standard set forth in OCGA § 17-7-131. *Turpin v. Hill*, *supra* at 304(4), 498 S.E.2d 52. However, the habeas court, on motion for reconsideration, once again granted a limited writ ordering a jury trial on the question of mental retardation, with Hill bearing

the burden of proof under the preponderance of the evidence standard.

(A) The habeas court concluded that Hill is now entitled to a jury trial on the issue of mental retardation under the authority of *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), wherein the Supreme Court of the United States held that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt[,]" and under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), wherein the Supreme Court announced a federal constitutional ban on executing mentally retarded persons. We hold that *Ring* and *Atkins* do not require a jury trial on Hill's alleged mental retardation for the following reasons:

(1) First, we hold that *Ring* does not have retroactive effect in the present case, a collateral review proceeding instituted after the appeals from the original trial have been completed. We have adopted the "pipeline" rule regarding the retroactivity of new rules of criminal law, and we apply that rule in conformity with at least the minimum guarantees applicable to the states under the United States Supreme Court's retroactivity jurisprudence. See *Luke v. Battle*, 275 Ga. 370, 565 S.E.2d 816 (2002); *Taylor v. State*, 262 Ga. 584, 586(3), 422 S.E.2d 430 (1992). See also *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (discussing the effect of a change in federal statutory law on retroactivity rules in second and subsequent federal habeas petitions); *Colwell v. State*, 59 P.3d 463, 470(III)(A) (Nev.2002) (noting that the United States Supreme Court's retroactivity requirements represent the minimum requirements applicable to the states). In applying the pipeline rule, we have held that new rules of criminal procedure, as distinguished from substantive criminal law, generally cannot be

applied retroactively. *Luke v. Battle*, *supra* at 370, 565 S.E.2d 816. A new rule of criminal law will have retroactive effect if it falls within one of the following two exceptions: new rules that place certain conduct beyond the power of the State to proscribe, that is, a change in substantive criminal law; and, watershed rules concerning procedures that are implicit in the concept of ordered liberty and that implicate the fundamental fairness and accuracy of the criminal proceeding. See *Bousley v. United States*, 523 U.S. 614, 619-620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *Teague v. Lane*, 489 U.S. 288, 311(V), 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

We find that the rule announced in *Ring*, which overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), was a new rule of criminal law. *Turner v. Crosby*, 339 F.3d 1247, 1284(IV)(B)(1) (11th Cir.2003); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828, 833(III)(C) (2003); *Colwell v. State*, *supra* at 472-473(III)(A). However, we also find that the new rule announced in Ring, assuming that its jury requirement is even applicable to findings of mental retardation, does not fall within one of the two exceptions to non-retroactivity described above. The first exception clearly does not apply, and we find that the fundamental fairness and accuracy of determining mental retardation would not be increased by having a jury rather than a trial judge make the determination. *Turner v. Crosby*, *supra* at 1285(IV)(B)(2); *State v. Towery*, *supra* at 834-835(III)(D); *Colwell v. State*, *supra* at 473(III)(A). See also *Ring v. Arizona*, *supra* at 621, 122 S.Ct. 2428 (O'Connor, J., dissenting and noting that majority holding would not have retroactive effect under *Teague v. Lane*, *supra*).

(2) Second, even if *Ring* were retroactive, we do not find that it establishes a constitutional requirement that a jury determine the question of mental retardation regardless of the procedural posture of a case. *Ring*, like its predecessor, *Ap-*

prendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), held that facts which determine the *upper* limit of punishment for particular criminal conduct must be proved to a jury unless, of course, the right to a jury is waived by the defendant. Factual findings of specific acts or omissions, of specific degrees of mens rea, or of the presence of one or more statutory aggravating circumstances result in "an *increase* in a defendant's authorized punishment...." (Emphasis supplied.) *Ring v. Arizona*, *supra* at 602(II), 122 S.Ct. 2428. However, a claim of mental retardation is a means by which a death penalty defendant may seek to have his possible sentence *limited* despite the fact that the statutory elements for the death penalty might be present. Indeed, the Court in *Atkins* refers to mental retardation as an "exemption" from the death penalty. *Atkins v. Virginia*, *supra* at 320(IV), 122 S.Ct. 2242. Furthermore, *Ring* specifically noted that the defendant had made "no Sixth Amendment claim with respect to mitigating circumstances[,]" which indicates that the Court did not find a jury trial right for factors in mitigation of punishment, such as mental retardation. *Ring v. Arizona*, *supra* at 597(II), fn. 4, 122 S.Ct. 2428. The Supreme Court of Louisiana observed that "*Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates 'as the functional equivalent of an element of a greater offense.' [Cit.]" *State v. Williams*, 831 So.2d 835, 860(5), fn. 35 (La.2002) (quoting *Ring v. Arizona*, *supra* at 609(II), 122 S.Ct. 2428). Likewise, we conclude that the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*.

Furthermore, in *Atkins*, the Supreme Court of the United States made clear that it was entrusting the states with the power to develop the procedures necessary to enforce the newly recognized federal constitutional ban on the execution

of the mentally retarded: "As was our approach in *Ford v. Wainwright*, with regard to insanity [at the time of execution], 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' [Cit.]" *Atkins v. Virginia*, *supra* at 317(III), 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality opinion)). The plurality in Ford also stated the following: "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests...." *Ford v. Wainwright*, *supra* at 416(V)(A), 106 S.Ct. 2595.

> Instructive analogies may be found in [Florida's] own procedures for determining whether a defendant is competent to stand trial, Fla. Stat. §§ 916.11-916.12 (1985 and Supp. 1986), or in the comprehensive safeguards that Florida ensures to those subjected to involuntary commitment proceedings, Fla. Stat. § 394.467 (1986).

Ford v. Wainwright, *supra* at 417(V)(A), fn. 4, 106 S.Ct. 2595. None of these Florida statutes that the Court found to be instructive analogies for appropriate procedures for determining incompetence to be executed required a jury trial. We conclude that the binding authority of the portion of *Ford* quoted by the *Atkins* Court and the persuasive authority of the closely related portions of *Ford* not quoted in *Atkins* indicate that there is no constitutional right to a jury trial on the issue of mental retardation regardless of the procedural posture of a case. See also *State v. Williams*, *supra* at 860 ("[T]he majority of states which have provided a statutory exemption from capital punishment for the mentally retarded have made the finding of mental retardation a matter for the trial judge as opposed to the jury." (Emphasis supplied.)).

(3) Third, Hill *could have obtained* a jury finding on his alleged mental retardation in his original trial if he had asked for one. OCGA § 17-7-131(c)(3), (j). Instead, he presented expert testimony showing that he had an intelligence quotient

of 77, which is somewhat slow but not mentally retarded, and argued that he had functioned admirably well in society and in his family life despite his intellectual shortcomings. Therefore, regardless of whether *Ring* is retroactive or ever requires a jury determination of mental retardation, we cannot regard Hill as having been denied a jury trial on his alleged mental retardation, because he had such a right at trial and waived it. Having done so, Hill is now entitled only to have the habeas court determine, as this Court directed on remand, whether a miscarriage of justice would result if Hill were executed, in light of his alleged mental retardation. OCGA § 9-14-48(d); *Turpin v. Hill*, *supra* at 303(3)(b), 498 S.E.2d 52. Thus, we reiterate our holding in the first appeal in this case that such an alleged miscarriage of justice must be considered by the habeas court itself, "without intervention of [a] jury...." *Turpin v. Hill*, *supra* at 304(4), 498 S.E.2d 52.

(B) The habeas court also concluded that Hill must prove his alleged mental retardation only by a preponderance of the evidence and that the beyond a reasonable doubt standard which this Court ordered applied on remand is unconstitutional. The habeas court reasoned that the newly recognized federal constitutional ban on the execution of mentally retarded persons announced in *Atkins* could not be enforced with sufficient due process protections under the beyond a reasonable doubt standard. However, the exemption from death sentences for mentally retarded persons is not new to Georgia death penalty defendants, and this Court has already determined that, under the *principles* of federal constitutional law, it is acceptable to apply the beyond a reasonable doubt standard of proof to a mental retardation claim at trial. *Mosher v. State*, 268 Ga. 555, 558-560(4), 491 S.E.2d 348 (1997). *Atkins* announced a new federal constitutional prohibition against executing an entire class of persons. We deem this exemption to be comparable to placing certain conduct

beyond the power of the State to punish and, accordingly, we must give the new federal right to death penalty exemption retroactive effect to the extent that it exceeds any preexisting, comparable State right. *Bousley v. United States*, *supra* at 619-620, 118 S.Ct. 1604; *Penry v. Lynaugh*, 492 U.S. 302, 330(IV)(A), 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."); *Teague v. Lane*, *supra* at 311(V), 109 S.Ct. 1060; *Luke v. Battle*, *supra* at 370, 565 S.E.2d 816. See also *United States v. Johnson,* 2003 U.S. Dist. Lexis 3778, *31 (F) (N.D.Ill. March 11, 2003) (government conceded retroactivity of *Atkins*). Now that the Georgia exemption from death sentences for mentally retarded persons is paralleled by a new federal exemption, we must determine whether, under the *authority* of federal constitutional law, the beyond a reasonable doubt standard continues to be an acceptable standard of proof to apply to mental retardation claims.

As we noted above, *Atkins* specifically left "'to the States the task of developing appropriate ways to enforce the [federal] constitutional restriction'" on executing the mentally retarded. *Atkins v. Virginia*, *supra* at 317(III), 122 S.Ct. 2242. Furthermore, nothing in Atkins instructs the states to apply any particular standard of proof to mental retardation claims. "[T]he United States Supreme Court has not mandated a particular standard, but has left the task to the individual states...." *Murphy v. State*, 54 P.3d 556, 568, fn. 20 (Okl.Crim.App.2002). Therefore, we must apply Georgia law, which was the first in the nation to prohibit the execution of the mentally retarded, in a manner which is consistent with established federal constitutional principles as they have been announced with respect to other, comparable rights.

As we reasoned in *Mosher*, a mental retardation claim is comparable to a claim of insanity at the time of the crime in that both relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subject. Accordingly, we took guidance from *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), which approved application of the beyond a reasonable doubt standard to insanity claims, and we concluded that the same standard could be applied constitutionally to mental retardation claims. *Mosher v. State*, *supra* at 559-560(4), 491 S.E.2d 348. We again find the comparison between claims of insanity and of mental retardation to warrant a conclusion that the beyond a reasonable doubt standard may be applied constitutionally to mental retardation claims.

Furthermore, as expressed in *Mosher*, *supra* at 560(4), 491 S.E.2d 348, we again distinguish the fundamental right not to stand trial implicated in *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) from the procedural burden of proving mental retardation. Contrary to the dissent's obviously inaccurate reading of *Mosher*, this Court specifically applied federal precedent and did not hold that such "precedent had no bearing on what burden of proof could be imposed...." Dissenting opinion, p. 271, fn. 13. Indeed, we have repeatedly rejected the application of *Cooper's* preponderance of the evidence standard to cases involving retardation even as the number of other jurisdictions requiring proof by a higher standard has increased from two to five. Dissenting opinion, p. 274, fn. 26; *Head v. Ferrell*, 274 Ga. 399, 412(VI), 554 S.E.2d 155 (2001); *Jenkins v. State*, 269 Ga. 282, 292(17), 498 S.E.2d 502 (1998) (over a dissent at 298-300, 498 S.E.2d 502 based on *Cooper*); *Mosher v. State*, *supra*; *Murphy v. State*, *supra* at 568, fn. 20. Both courts and legislatures have had little time to develop this area of the law and, in choosing a particular standard of proof, we are the only state supreme court that has had the

benefit of a legislative judgment that the reasonable doubt standard is appropriate. As Hill concedes, no other state legislature has enacted that standard for retardation determinations in death penalty cases. However, since *Atkins*, one state court has relied, as this Court now does, on a statute which requires a standard higher than preponderance of the evidence. *State v. Grell*, 205 Ariz. 57, 66 P.3d 1234, 1240(B)(2) (2003). Since the reasonable doubt standard is clearly constitutionally permissible for insanity determinations, and we have already applied *Cooper* and other federal authority to the choice of a standard of proof in mental retardation cases, and the General Assembly has selected the reasonable doubt standard, we believe that *Cooper* should not be extended to retardation decisions unless the Supreme Court of the United States so requires at some future date.

Hill argues that additional protection for the mentally retarded is necessary because *Atkins* recognized that truly mentally retarded persons may face a "special risk of wrongful execution." *Atkins v. Virginia*, *supra* at 321(IV), 122 S.Ct. 2242. However, we conclude that the special risks and limitations suffered by truly mentally retarded persons at trial are sufficiently counterbalanced by the joint safeguards of Georgia's procedure for demonstrating incompetency to stand trial under the preponderance of the evidence standard and mental retardation under the beyond a reasonable doubt standard. See OCGA §§ 17-7-130, 17-7-131(c)(3), (j); *Partridge v. State*, 256 Ga. 602, 603(1), 351 S.E.2d 635 (1987) ("the defendant has the burden to prove incompetency by a preponderance of the evidence").

We also conclude that a higher standard of proof serves to enforce the General Assembly's chosen definition of what degree of impairment qualifies as mentally retarded under Georgia law for the purpose of fixing the appropriate criminal penalty that persons of varying mental impairment should bear for their capital crimes, in light of their individual "di-

minish[ed] ... personal culpabilit[ies]" and the varying degrees of deterrence possible. *Atkins v. Virginia*, *supra* at 318-320(IV), 122 S.Ct. 2242. Immediately before its statement that it was " 'leav[ing] to the States the task of developing appropriate ways to enforce the constitutional restriction' " on executing mentally retarded persons, the Court in *Atkins* recognized that, despite a "national consensus" against executing mentally retarded persons, there might be "serious disagreement ... in determining which offenders are in fact retarded." *Atkins v. Virginia*, *supra* at 317(III), 122 S.Ct. 2242. In view of the lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences, we conclude that the Georgia General Assembly, the first legislative body to create such an exemption, was originally and now remains within constitutional bounds in establishing a procedure for considering alleged mental retardation that limits the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.

Hill would have borne the burden of proof of his alleged mental retardation under the beyond a reasonable doubt standard if he had raised a mental retardation claim at trial. Having concluded that such standard of proof would have been constitutionally permissible at trial, we see no reason why Hill should bear a lighter burden under the miscarriage of justice exception in this habeas corpus case. See *Head v. Ferrell*, *supra* at 402(III), 554 S.E.2d 155 (noting that "an extremely high standard applies" to miscarriage of justice claims). Accordingly, we conclude that the habeas court, having previously found that Hill had failed to prove his mental retardation beyond a reasonable doubt, erred in granting Hill's motion for reconsideration and ordering the application of a lower standard of proof.

(C) The Warden argues that the habeas court exceeded its jurisdiction on remand in ordering a jury trial on Hill's al-

leged mental retardation and the application of the preponderance of the evidence standard, both of which were contrary to this Court's direction.

> When an appellate court vacates a [lower] court's judgment and remands for findings of fact and conclusions of law on a specific issue, this does not permit the [lower] court to reopen the case for other purposes. Instead, the scope of the [lower] court's authority to act on remand is limited to the specific purpose of making the applicable findings and conclusions.

Marsh v. Way, 255 Ga. 284, 285(2), 336 S.E.2d 795 (1985). Consequently, the habeas court had no authority to disregard this Court's order. We decline to address the additional ground raised by the Warden regarding the timing of the habeas court's order granting the motion for reconsideration.

(D) Because we conclude that the habeas court erred in ordering a jury trial on Hill's alleged mental retardation, in ordering the application of the preponderance of the evidence standard, and in exceeding its limited authority on remand, we vacate the habeas court's order granting the motion for reconsideration of Hill's mental retardation claim and remand the case again for re-entry of an order in compliance with our previous direction.

III. Claims Barred by Res Judicata

The habeas court properly found claims previously rejected by this Court in Hill's direct appeal to be barred by res judicata. "[A]ny issue raised and ruled upon in the petitioner's direct appeal may not be reasserted in habeas corpus proceedings...." *Gaither v. Gibby*, 267 Ga. 96, 97(2), 475 S.E.2d 603 (1996). The following issues are barred to the extent that they were raised in Hill's direct appeal: whether the State improperly commented on Hill's silence and whether the curative instruction given in response to the comment was sufficient; whether the prosecutor made im-

proper reference to the Bible in closing argument in the sentencing phase; whether the State or trial court violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); whether the trial court erred in excluding as irrelevant evidence of the victim's character in the sentencing phase; whether the evidence supported the OCGA § 17-10-30(b)(7) aggravating circumstance; whether the trial court's misstatement before the beginning of the sentencing phase that aggravated assault was a capital felony was reversible error; whether the trial court erred in finding jurors Flowers and Daniel unqualified to serve; whether the trial court improperly limited voir dire; whether the District Attorney's comment to juror Mackey regarding the jury not actually "sending" the defendant to death required reversal; whether the allegedly unreasonable length of the trial days constituted error; whether the trial court erred in replacing an ill juror; whether the trial court committed reversible error during the guilt/innocence phase by admitting evidence regarding Hill's murder of his girlfriend; whether the trial court erred in allowing two witnesses to give rebuttal testimony in the sentencing phase; whether the trial court erred in allowing the prosecutor to see the report of Hill's psychologist during the trial; whether the evidence was sufficient to support the conviction and death sentence; and, whether Hill's death sentence or Georgia death sentences in general are arbitrary, capricious, discriminatory, or disproportionate.

IV. Claims Barred by Procedural Default

Claims which could have been raised at trial or on direct appeal, but which are raised for the first time in habeas corpus proceedings, and which do not involve sentencing phase jury instructions in death penalty trials, are barred by procedural default unless the petitioner meets the "cause and prejudice" test. OCGA § 9-14-48(d); *Turpin v. Todd*, *supra* at 824(2)(a), 493 S.E.2d 900; *Black v. Hardin*, *supra* at 240(4), 336 S.E.2d 754. Compare *Stynchcombe v. Floyd*,

252 Ga. 113, 114-115, 311 S.E.2d 828 (1984) (addressing sentencing phase jury charges in death penalty cases). That test is satisfied only where a force external to the defense impeded counsel's efforts to raise a defaulted claim at trial or on appeal or where counsel rendered constitutionally deficient performance in waiving the claim at trial or omitting it on appeal. The test also requires that the omission or waiver resulted in actual, substantial prejudice that infected the petitioner's entire trial with error of constitutional dimensions. *Head v. Ferrell*, *supra* at 401-402(III), 554 S.E.2d 155; *Turpin v. Todd*, *supra* at 824-829(2), 493 S.E.2d 900; *Turpin v. Mobley*, 269 Ga. 635, 637(2), 502 S.E.2d 458 (1998). The test is not applied to defaulted claims where necessary to prevent a "miscarriage of justice," but an extremely high standard applies in such cases. *Head v. Ferrell*, *supra* at 402(III), 554 S.E.2d 155; *Valenzuela v. Newsome*, 253 Ga. 793, 796(4), 325 S.E.2d 370 (1985).

The following claims in Hill's cross-appeal are barred by procedural default to the extent that they concern issues not raised on direct appeal: alleged suppression of evidence; false testimony and arguments; improper comments by the State in its opening statement, in its closing argument, and during the sentencing phase; interference by the prosecutor and the trial court with the defense's investigation; discovery violations by the State; juror bias, misconduct, and influence by third parties; improper communication between the trial judge and the jurors; exclusion in the guilt/innocence phase of evidence of past sexual and physical assaults allegedly committed by the victim, who was sleeping when he was murdered; denial of funds for expert assistance for jury selection issues; denial of additional funds for investigation and mental health examinations; various errors in the trial court's guilt/innocence phase jury charge; the trial court's error in responding to the jury's questions during the sentencing phase; error in failing to strike jurors Mackey, Davis, Kearse,

Kirkland, and Childers; racial bias in the trial court's conduct of voir dire; improper exclusion of jurors opposed to the death penalty; the trial court's coercing a prisoner to testify; inadequate sequestration of the jury; excessive security; improper hearsay testimony; improper limitation of cross-examination; improper excusing of jurors for hardship; admission of inflammatory and unduly prejudicial evidence; error by the trial court in unsealing the ex parte transcripts prior to the motion for new trial; invalidity of the OCGA § 17-10-30(b)(1) aggravating circumstance in Hill's case; tainting of the indictment by discrimination, bias, pre-trial publicity, and the State's failure to present exculpatory evidence; the arbitrary discretion exercised by the District Attorney in seeking the death penalty; the unconstitutionality of the Unified Appeal Procedure; the bias of the jury against Hill in the sentencing phase after finding him guilty of the murder; use in sentencing of an unconstitutionally obtained prior conviction and of improper aggravating evidence; race discrimination by the "decision makers" in Hill's case; the invalidity of the conviction in light of allegedly inadequate medical care provided to the victim; and, cumulative error.

Applying the law described above regarding procedurally defaulted claims, we find that Hill has failed to overcome the bar to any of these claims, most of which are raised in this cross-appeal in summary fashion.

V. Sentencing Phase Jury Charges

Claims of error in the sentencing phase jury charges in a death penalty case are not subject to procedural default. *Tucker v. Kemp*, 256 Ga. 571, 573-574, 351 S.E.2d 196 (1987); *Stynchcombe v. Floyd, supra* at 114-115, 311 S.E.2d 828. However, we find no merit in Hill's contentions regarding those charges.

(A) The jury was not misled to believe that they were to determine Hill's sentence for any crime other than the one

murder. *Palmer v. State*, 271 Ga. 234, 238(6), 517 S.E.2d 502 (1999) (examining a challenged sentencing phase jury instruction in light of the charge as a whole and concluding that jury was not misled).

(B) We find that the jury was not misled regarding the OCGA § 17-10-30(b)(2) aggravating circumstance by the trial court's instruction as it would have been understood in connection with the jury's sentencing verdict form and written instructions. *Palmer v. State*, *supra*. Furthermore, failure of the (b)(2) aggravating circumstance would not affect Hill's death sentence, because the independent (b)(1) aggravating circumstance supported that sentence. See *Colwell v. State*, 273 Ga. 634, 642(11)(d), 544 S.E.2d 120 (2001).

(C) We find no error in the following areas of the trial court's charge, as to which Hill makes conclusory allegations: the jury's consideration of mitigating evidence; the verdict form; the trial court's alleged expression of opinion; the definition of the OCGA § 17-10-30(b)(7) aggravating circumstance; jury unanimity; general sufficiency of the charges at the beginning and the end of the sentencing phase; the possibility of parole and the presumption that the jury's verdict would be carried out; the role of a parole waiver agreement, which had not been reached in Hill's case; and reasonable doubt, which was properly charged in the guilt/innocence phase.

VI. Alleged Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance, a defendant must show that counsel rendered deficient performance and that actual prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687(III), 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Francis*, 253 Ga. 782, 783-784(1), 325 S.E.2d 362 (1985). Counsel are "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[,]"

and counsel's performance is evaluated without reference to hindsight. *Strickland v. Washington, supra* at 689-690(III)(A), 104 S.Ct. 2052. A petitioner has suffered actual prejudice only where "there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different [Cit.]" *Smith v. Francis, supra* at 783(1), 325 S.E.2d 362. Ineffective assistance claims are mixed questions of law and fact. We accept the habeas court's findings of fact unless clearly erroneous and independently apply the law to those facts. *Strickland v. Washington, supra* at 698(IV), 104 S.Ct. 2052; *Lajara v. State*, 263 Ga. 438, 440(3), 435 S.E.2d 600 (1993). Applying the law described above, we conclude that Hill's claims of ineffective assistance of trial and appellate counsel are without merit.

(A) Hill contends that the trial court's denial of additional funds for investigation expenses rendered his trial attorneys ineffective. However, the habeas testimony of Hill's trial counsel and investigator and the documentary evidence do not support Hill's assertion that his lawyers' strategy, preparation, and trial performance were deficient. The record reveals that Hill's trial attorneys and investigator made vigorous efforts to interview family members, prison inmates, and prison staff and to obtain Hill's school, medical, and Navy records. The interviews and records indicated that Hill was intellectually slow, suffered fevers and convulsions as a child, suffered from seizures or drug-induced delirium several times in his later life, was kidnapped and possibly molested as a child, was physically abused by his mother as a child, worked and provided money to his family from the age of twelve into his adulthood, advanced quickly in the Navy, becoming a nuclear weapons loader, and suffered a precipitous personal decline upon breaking up with his girlfriend, which resulted eventually in his murdering her in public.

Counsel also determined that Hill's father was an alcoholic, was abusive to Hill's mother, and was extremely neglectful of Hill and his siblings' emotional and physical needs. The trial court authorized funds for all of this investigative work and for psychological testing of Hill, which focused on his family and medical history, his intellectual slowness, and his perception that Mr. Handspike had a sexual interest in him, all of which were testified to by Hill's psychological expert at trial.

The few instances where Hill showed that additional documents and testimony might have been available if his trial counsel had investigated further or had gone in person to request documentary records fail to demonstrate either that counsel rendered deficient performance or that prejudice of constitutional proportions resulted from the absence of those items at trial. Hill's trial attorneys reasonably abandoned their efforts to obtain certain school records, after making repeated requests, when they, as well as the trial court, were informed that no further records existed. Counsel also did not perform deficiently in failing to request certain other school records when Hill's mother incorrectly informed counsel that Hill had begun his schooling in a different school district. Furthermore, the standardized test scores in the newly discovered records would have been merely cumulative of other evidence of Hill's mental slowness, including the testimony of his psychiatrist, and, therefore, trial counsel's failure to obtain the additional records did not result in prejudice to Hill. Likewise, particularly in light of the similar testimony presented at trial, Hill did not suffer prejudice from his trial attorneys' failure to obtain testimony like that which he presented in the habeas court from his family, teachers and the defense investigator regarding his intellectual abilities. Hill also failed to demonstrate that he suffered constitutionally significant prejudice from his trial counsel's failure to present testimony from Navy personnel in an effort to

counter the impression left by his Navy record that he had performed well. Even if Hill's psychological expert had altered his trial testimony in light of the newly discovered documents and testimony in the manner he claimed in the habeas proceeding that he would have, we do not find that this altered trial testimony would have in reasonable probability changed the outcome of the case.

Hill's trial attorneys presented testimony in the sentencing phase about his alcoholic and abusive father, his family's poverty, his lack of adequate clothing and food, his childhood and adulthood medical and psychological problems, his personal decline following a breakup with his girlfriend, and his work history and support of his family. Hill argues that counsel should have also presented testimony that his mother, who testified on his behalf in the sentencing phase, and his grandfather had beaten him as a child; that other members of his family have suffered seizures; and, that he and some of his siblings had been kidnapped by a man who, according to Hill's habeas affidavits, molested one of his brothers after he and the other siblings escaped the kidnapping and who, in another incident, committed statutory rape on a girl. We find, in light of the compelling testimony actually presented, that trial counsel did not render deficient performance in failing to present additional testimony and that Hill did not suffer prejudice from its absence.

Hill also contends that his trial attorneys rendered ineffective assistance in preparing and presenting evidence of the victim's alleged violent and sexually aggressive conduct as evidence in mitigation. The habeas and trial records reveal that trial counsel interviewed prison inmates and staff, discussed the matter with Hill, attempted to elicit testimony on the subject from witnesses from the prison at trial, and presented testimony from his psychological expert regarding how Hill would have reacted to such conduct in light of his psychological health and background. We do not find that

counsel performed deficiently in preparing and presenting evidence of alleged provocation by the victim. See also *Hill v. State*, *supra* at 44-45(16), 427 S.E.2d 770 (holding that the "'personal characteristics of the victim'" are generally not relevant, even in the sentencing phase).

We find no merit in Hill's ineffective assistance claims regarding four prospective jurors. Counsel's conduct during voir dire of jurors Mackey and Mosley was reasonable in light of those jurors' expressions of uncertainty regarding their ability to impose a death sentence, and neither of those jurors would have been excusable for favoring the death penalty too strongly. Trial counsel did not perform unreasonably in the voir dire of juror Giddens, who expressed her squeamishness about gory photographs but indicated that she would remain impartial. Counsel did not perform unreasonably in the voir dire of juror McCorkle. That juror voluntarily disclosed her experience with a young black man who had been committed to a mental institution after harassing her repeatedly, but she indicated that she thought she could be a fair juror.

Hill's remaining ineffective assistance of trial counsel claims are so lacking in specific argument that they are incapable of being meaningfully discussed. We deem these claims to be abandoned. See Supreme Court Rule 22.

(B) Hill further contends that his appellate counsel rendered ineffective assistance in failing to argue on appeal that the trial court erroneously denied sufficient funds for the defense's investigation. As our discussion above of trial counsel's actual investigation of the case reveals, Hill has not shown that he suffered prejudice from the trial court's decisions regarding funding. We conclude, therefore, that Hill has failed to show either deficient performance of appellate counsel or prejudice stemming therefrom. See *Shorter v. Waters*, 275 Ga. 581, 584-585, 571 S.E.2d 373 (2002) (holding that "a habeas petitioner [must] establish by a preponderance

of the evidence that an ignored issue [on appeal] outweighed the enumerated errors"). Similarly, we find no merit in Hill's remaining, conclusory allegations of appellate counsel's ineffective assistance.

Judgment reversed and case remanded in S03A0559. Judgment affirmed in S03X0560.

All the Justices concur, except FLETCHER, C.J., SEARS, P.J., and BENHAM, J., who dissent.

SEARS, Presiding Justice, dissenting.

1. This case is not merely about the procedures involved in proving a statutory defense. To the contrary, we are deciding today whether the state's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right. United States Supreme Court precedent instructs that the Federal Constitution's guarantee of procedural due process, as made applicable to the states through the Fourteenth Amendment, forbids the state from requiring a defendant convicted of a capital crime to prove his claim of mental retardation beyond a reasonable doubt. Rather, a condemned prisoner who claims mental retardation may only be held to a preponderance of the evidence standard. Because the majority opinion errs by upholding the beyond a reasonable doubt standard, I respectfully dissent.

2. As the majority concedes,[1] in *Atkins v. Virginia*,[2] the United States Supreme Court established a fundamental right under the Federal Constitution prohibiting the states from executing mentally retarded persons convicted of capital crimes. The majority posits that in *Atkins*, the United States Supreme Court "made clear that it was entrusting the [individual] states with the power to develop the procedures nec-

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[1] Maj. op. at 258, 587 S.E.2d at 621.

[2] 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

essary to enforce the newly recognized federal constitutional ban on the execution of the mentally retarded."[3] Hence, the majority concludes, Georgia is free in OCGA § 17-7-131(c)(2) to require condemned prisoners to establish the fact of their mental retardation beyond a reasonable doubt. This reasoning, however, cannot withstand scrutiny.

When concluding that the state has unfettered power to develop its own procedures for enforcing the federal ban on executing the mentally retarded, the majority opinion states that the United States Supreme Court delegated this same authority to the states in *Ford v. Wainwright*,[4] in which the Court ruled that insane persons are protected from execution under the Fourteenth Amendment and held unconstitutional Florida's statutory procedure for determining whether a convicted defendant is insane.[5] *Ford v. Wainwright*, however, plainly holds that the state's power to enforce the federal ban on executing insane persons is circumscribed by the Eighth and Fourteenth Amendments to the Federal Constitution: "Once a substantive right or restriction is recognized in the Constitution ... its enforcement is in no way confined to the rudimentary process deemed adequate in ages past"[6] and federal constitutional standards will determine the adequacy of the state procedures upholding the right or enforcing the restriction.[7]

This rule of law was clarified in *Cooper v. Oklahoma*,[8] in which the Supreme Court held unconstitutional under the

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[3] Maj. op. at 258, 587 S.E.2d at 620.

[4] 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

[5] Maj. op. at 258, 587 S.E.2d at 620.

[6] 477 U.S. at 410, 106 S.Ct. 2595.

[7] 477 U.S. at 413-418, 106 S.Ct. 2595.

[8] 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

Fourteenth Amendment a state statute requiring death penalty defendants to prove by clear and convincing evidence their incompetence to stand trial, and ruled that such defendants can be held to nothing higher than a preponderance of the evidence standard.[9] Regarding the State's power to "develop the procedures necessary to enforce the ... federal constitutional ban"[10] on prosecuting incompetent criminal defendants, the High Court said:

> It is normally within the power of the State to establish the procedures through which its [death penalty] laws are given effect, including those relating to the burden of producing evidence and the burden of persuasion.... [However,] the State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." This case involves such a rule.[11]

As established by the *Atkins* decision, the issue at stake in the present appeal – what burden of proof the state may impose upon a condemned prisoner who would avoid the death penalty due to mental retardation – implicates a fundamental principle of justice that has become firmly established in the nation's conscience and tradition – the right of mentally retarded people to be protected from execution by the state.[12]

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[9] 517 U.S. at 355-356, 363-64, 116 S.Ct. 1373.

[10] Maj. op. at 258, 587 S.E.2d at 620.

[11] *Cooper v. Oklahoma*, 517 U.S. at 367-368, 116 S.Ct. 1373, quoting *Patterson v. New York*, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Accord *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952).

[12] *Atkins*, 536 U.S. at 315-316, 122 S.Ct. 2242 (the fact that between 1986 and 2001, seventeen states and the federal government enacted bans on executing the mentally retarded is "powerful evi-

As made clear by the precedent discussed above, it follows that the state's power to establish the procedures necessary to enforce the federal constitutional ban on executing the mentally retarded is not left to the state's wholesale discretion, but rather must conform to the United States Constitution's guarantee of procedural due process. The majority errs by holding otherwise.[13]

3. Having established that the procedures employed by the state to enforce the federally recognized right of the mentally retarded to be protected from state-sanctioned execution are subject to federal standards, the inquiry turns to whether Georgia's beyond a reasonable doubt standard can withstand scrutiny under the Federal Constitution. As explained below, it cannot.

As mentioned above, in *Cooper v. Oklahoma*,[14] the United States Supreme Court considered what standard a capital defendant would have to satisfy in order to show that he was incompetent to stand trial. The Court unanimously rejected Oklahoma's contention that it could hold the defendant to a clear and convincing standard, and ruled that only a

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dence that today our society views mentally retarded offenders as categorically less culpable than the average criminal").

[13] The majority's reliance upon *Mosher v. State*, 268 Ga. 555, 491 S.E.2d 348 (1997) is misplaced. That opinion upheld OCGA § 17-7-131(c)(2)' s "beyond a reasonable doubt" standard only because at the time of that decision, there was no federal ban on executing the mentally retarded and hence, federal precedent had no bearing on what burden of proof could be imposed on condemned defendants who seek to prove their mental retardation. 268 Ga. at 560, 491 S.E.2d 348. Obviously, that rationale became invalid in 2002 when *Atkins* announced a federal ban on executing mentally retarded persons.

[14] See note 8, *supra*.

preponderance of the evidence standard would satisfy federal constitutional muster. After noting that the state did not contend it could require a defendant to prove incompetence beyond a reasonable doubt (and indicating that such an argument would be rejected on its face),[15] the Court held that procedural due process does not permit the state to prosecute a defendant once he has "demonstrated that he is more likely than not incompetent."[16] The Court based its decision upon the significant risks inherent in [the state's] practice of requiring the defendant to prove incompetence by clear and convincing evidence.... "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' [Cit.]" The "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."[17]

Oklahoma's practice of requiring an accused to prove incompetence by clear and convincing evidence was found to violate the constitutional guarantee of procedural due process because

> [f]ar from "jealously guarding" an incompetent criminal defendant's fundamental right not to stand trial, [the state statute] requiring the defendant to prove incompetence by

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[15] 517 U.S. at 355, 116 S.Ct. 1373.

[16] 517 U.S. at 355, 116 S.Ct. 1373. In its decision, the Court noted that historically, incompetence has been treated synonymously with insanity. 517 U.S. at 357, n. 8, 116 S.Ct. 1373.

[17] 517 U.S. at 363, 116 S.Ct. 1373, quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) and *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 283, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

> clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent.[18]

Cooper (and the precedent upon which it is based) instructs that Georgia's statute requiring condemned defendants to prove their alleged mental retardation beyond a reasonable doubt violates due process. Georgia's scheme for enforcing the federal ban on executing the mentally retarded is fraught with even greater risks than those at issue in *Cooper*. The burden of proof imposed on Georgia's mentally retarded defendants – beyond a reasonable doubt – is the most stringent in our criminal justice system, and defendants who seek to satisfy this burden in order to avoid the death penalty bear an enormous risk of erroneous decisions.[19] That risk is compounded by the diminished capacity of mentally retarded offenders, who are more prone than others to make false confessions,[20] and who also exhibit a lesser ability ... to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors ....may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and [whose] demeanor may create an unwarranted impression of lack of re-

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[18] 517 U.S. at 363, 116 S.Ct. 1373, quoting *Jacob v. New York City*, 315 U.S. 752, 752-753, 62 S.Ct. 854, 86 L.Ed. 1166 (1942).

[19] *Cooper*, 517 U.S. at 363-364, 116 S.Ct. 1373.

[20] *Atkins*, 536 U.S. at 320, 122 S.Ct. 2242. Recently, at least two mentally retarded death row inmates who confessed to capital crimes they did not commit have been exonerated due to DNA evidence. See "Porter Fully Savors First Taste of Freedom," Chicago Tribune, Feb. 6, 1999, p. N1; "Death Row Inmate Gets Clemency," Washington Post, Jan. 15, 1994, p. A1.

morse for their crimes.... **Mentally retarded defendants in the aggregate face a special risk of wrongful execution.**[21]

Furthermore, it is obvious that the consequences of an erroneous rejection of a capital defendant's claim of mental retardation are extreme and irredeemable. In capital proceedings, especially, courts should always demand factfinding procedures that uphold a heightened standard of reliability.[22] This is especially crucial when dealing with the mentally retarded, whose diminished capacities leave them vulnerable to a unique and significant risk of being wrongfully executed. Far from "jealously guarding"[23] the fundamental right of the mentally retarded to avoid execution, the majority opinion subjects them to this heightened risk, thereby increasing the likelihood of erroneous rejections of retardation claims, which will invariable lead to wrongful executions.

4. The Constitution cannot simultaneously limit the state to the preponderance of the evidence standard when seeking to prosecute a capital defendant who claims incompetence, yet allow the state to impose the beyond a reasonable doubt standard when that same defendant, after being convicted and sentenced to death, claims mental retardation. The majority opinion errs by concluding otherwise.

Even though a condemned prisoner does not enjoy the same presumptions as a criminal defendant who is yet to be tried, he has not altogether lost the protections of the Constitution, either. If the Constitution dictates that such a prisoner's

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[21] *Atkins*, 536 U.S. at 320-321, 122 S.Ct. 2242 (emphasis supplied).

[22] *Ford*, 477 U.S. at 411, 106 S.Ct. 2595.

[23] *Cooper*, 517 U.S. at 363, 116 S.Ct. 1373.

> execution [is] contingent upon establishment of a further fact [such as the lack of mental retardation], then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.[24]

In other words, due process forbids the state from imposing a higher evidentiary burden on a condemned prisoner when determining his competency for execution than the burden borne by the prisoner at trial. Accordingly, I would hold that the state is estopped from executing a condemned defendant once he has "demonstrated that he is more likely than not"[25] mentally retarded.

5. Although Georgia was the first state in the nation to prohibit the execution of mentally retarded persons, it is now the only state that requires condemned defendants to prove their retardation beyond a reasonable doubt.[26] Despite the federal ban on executing the mentally retarded, Georgia's statute, and the majority decision upholding it, do not prohibit the state from executing mentally retarded people. To the contrary, the State may still execute people who are in all probability mentally retarded. The State may execute people who are more than likely mentally retarded. The State may

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[24] *Ford*, 477 U.S. at 411-412, 106 S.Ct. 2595.

[25] *Cooper*, 517 U.S. at 355, 116 S.Ct. 1373.

[26] Of those states that permit the death penalty, eighteen have announced standards to protect the mentally retarded from execution. Ten states employ a "preponderance of the evidence" standard, while five states employ a "clear and convincing" standard. Bills regarding the standard of proof in mental retardation cases appear to be pending in two states.

even execute people who are almost certainly mentally retarded. Only if a mentally retarded person succeeds in proving their retardation beyond a reasonable doubt will his or her execution be halted. Based upon the precedent discussed above, I am convinced this situation violates the tenets of due process as that concept is embodied in our Federal Constitution. Therefore, I dissent.

I am authorized to state that Chief Justice FLETCHER and Justice BENHAM join me in this dissent.

SUPREME COURT OF GEORGIA

STRIPLING

v.

THE STATE.

No. S90P1326.

Feb. 22, 1991.
Reconsideration Denied March 15, 1991.

BELL, Justice.

This is a death penalty case. The defendant, Alphonso Stripling, was a cook trainee at a fast food restaurant in Douglasville. Very soon after the restaurant closed for the day on October 15, 1988, Stripling shot four employees of the restaurant, killing two of them. He left with the restaurant's cash receipts, stole a getaway car at gunpoint, and was arrested a short time later after a high-speed chase. In his possession at the time of his arrest were the stolen car, the restaurant receipts, and the murder weapon.

Stripling was convicted by a jury in Douglas County on two counts each of murder, armed robbery and aggravated assault. The jury found in favor of a death sentence on each of the two murder counts. He appeals. We affirm the conviction and death sentences.[1]

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[1] The crime occurred on October 15, 1988. On June 5, 1989, the defendant filed a special plea of incompetence to stand trial. The plea was tried before a jury on June 19 and 20, 1989, and the jury found against the plea. The trial of the case-in-chief began on June 21, 1989, and ended on July 1, 1989. A motion for new trial was filed August 9, 1989. The motion, as amended, was denied, after hearing, on April 27, 1990. The case was docketed in this court on July 10, 1990, and orally argued on September 19, 1990.

1. There was no abuse of discretion in the denial of sequestered voir dire. Sanborn v. State, 251 Ga. 169(3), 304 S.E.2d 377 (1983).

2. There was no abuse of discretion in the court's control of the voir dire examination. *Curry v. State*, 255 Ga. 215(2), 336 S.E.2d 762 (1985). The court's rulings on the qualifications of prospective jurors respecting their attitudes for or against the death penalty were "within the deference due the trial judge's determination." *Jefferson v. State*, 256 Ga. 821, 824, 353 S.E.2d 468 (1987).

3. Stripling filed a special plea of incompetence to stand trial. See OCGA § 17-7-130. The special jury impanelled to hear that issue found Stripling competent to stand trial. At the trial of the case in chief, Stripling contended he was insane, mentally ill and mentally retarded. The court charged the jury on the possible verdicts of guilty, not guilty, not guilty by reason of insanity, guilty but mentally ill and guilty but mentally retarded. See OCGA § 17-7-131(a)(3). On each count, the jury found Stripling guilty. At the sentencing phase of the trial, Stripling relied in large part on his mental condition in mitigation. The jury found in favor of capital punishment.

Stripling contends each of these verdicts is unsupported by the evidence and "the jury's verdicts of competency to stand trial, guilt and the sentence[s] of death must be vacated." Appellant's brief at 18.

The Competency Trial.

The defendant's expert witness testified that Stripling is mildly mentally retarded and is a "mild to moderate," chronic paranoid schizophrenic. However, Stripling was not psychotic, and was capable of cooperating with his attorneys; he understood the charges against him, the potential consequences of the trial, and could remember and discuss the facts of the crime.

The state's expert witness testified that Stripling was competent to stand trial. The state also presented the testimony of law enforcement witnesses who had the opportunity to observe and to converse with the defendant and who were of the opinion that Stripling was of normal and adequate intelligence, and did not seem to be suffering any serious mental disabilities.

A criminal defendant is competent to stand trial if he is capable of understanding the nature and object of the proceedings and is capable of assisting his attorney with his defense. *Brown v. State*, 215 Ga. 784(1), 113 S.E.2d 618 (1960). There is no significant conflict in the evidence on this issue, and the evidence supports the special jury's finding that Stripling was competent to stand trial.

The Guilt Phase of the Trial.

Two experts testified on behalf of the defendant at the guilt phase of the trial. Both agreed that Stripling was not insane at the time of the crime, i.e., that Stripling had the "mental capacity to distinguish between right and wrong in relation to the act[s]" constituting the crime. OCGA § 16-3-2.

One of these witnesses, a licensed psychologist and cognitive therapist, administered a battery of tests, including an IQ test on which Stripling achieved a score of 64. This score was consistent with a previous score of 68 on a test administered to the defendant some years earlier while in prison. It was inconsistent, however, with an IQ score of 111 on another prison test. The psychologist thought Stripling probably had cheated on this test. In his opinion, Stripling is mildly mentally retarded. The witness conceded, however, that an IQ score is subject to some margin of error, that an IQ test contains at least some cultural bias which could affect the score, and that emotional factors, including depression, could also affect the score.

The other defense expert, a psychiatrist, relying largely on the results of the psychologist's testing, agreed that Stripling is mentally retarded. Both experts also concluded, based in part on Stripling's self-reported auditory hallucinations, as well as the results of the Minnesota Multiphasic Personality Inventory (MMPI), that Stripling is mildly schizophrenic, and that he was mentally ill at the time of the crime. See OCGA § 17-7-131(a)(2) (defining "mentally ill"). There was no evidence of organic brain damage.

The state's expert did not agree that Stripling is either mentally ill or mentally retarded. He did not administer an IQ test for two reasons: (1) Stripling had recently been tested by the defense psychologist, and recent experience taking an IQ test can affect performance on the test, and (2) Stripling was severely depressed, and a score on a test administered to him while depressed would not have been a true indication of his intellectual ability. Based on his interviews with the defendant, and taking into consideration the adaptive skills demonstrated by the defendant, he concluded that the defendant is not mentally retarded.

He also concluded that Stripling was not "mentally ill" as that term is defined by OCGA § 17-7-131(a)(2). He noted that Stripling scored "exceedingly high" on the "F" or "fake" scale on MMPI tests administered to Stripling by both this witness and by the defense psychologist. Unlike the defense witnesses, he was unable to attribute the high "fake" score to the defendant's mental illness. Instead, he concluded that Stripling "was trying to make himself appear more mentally ill than he probably is."

Our Code provides that "the term 'mental illness' shall not include a mental state manifested only by repeated unlawful or antisocial conduct." OCGA § 17-7-131(a)(2). Stripling was convicted three times previously for armed robbery – in 1973, 1979 and 1980. In addition, the 1988 crime on trial here included charges of armed robbery and

murder. One of the defense experts conceded that this record "sound[s] like repeated unlawful antisocial conduct." The other expert conceded that if the defendant had acted on his own during one of the prior armed robberies – and the evidence shows he did – "it would make a difference" in his conclusion that the defendant is mentally retarded.

(a) The jury was entitled to conclude from the evidence either that Stripling did not have a "disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life," or that his mental state manifested itself only by "repeated unlawful or antisocial conduct," or both. OCGA § 17-7-131(a)(2). The jury was entitled to conclude that Stripling was not mentally ill. *Spivey v. State*, 253 Ga. 187, 188-89(1, 2), 319 S.E.2d 420 (1984); *Hood v. State*, 187 Ga. App. 88, 369 S.E.2d 348 (1988).

(b) Stripling argues it is "clear" he is mentally retarded, and the "evidence simply does not support any other conclusion." We disagree.

Our statutory definition of "mentally retarded" is consistent with that supplied by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Third Edition 1980) (hereinafter DSM III). The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period. OCGA § 17-7-131(a)(3).

"Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. DSM III, supra at 36. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs some-

what lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning." DSM III, supra at 37.

The evidence in this case does not demand a finding that Stripling is mentally retarded. The state's expert concluded to the contrary, and his testimony and other evidence in the case, as well as the state's cross-examination of the defendant's experts, provide a rational basis for the jury's verdict.

Viewing the evidence in the light most favorable to the verdict, we conclude the evidence supports the jury's conclusion that Stripling is not mentally retarded. *Spivey v. State*, supra; *Hood v. State*, supra.

(c) Aside from any question of mental illness or mental retardation, the evidence overwhelmingly supports Stripling's conviction on all counts. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The Sentencing Phase.

The defendant's argument that the sentences of death must be vacated is premised on his contention that the evidence admits of no conclusion but that he is mentally retarded. Since we hold to the contrary, this argument fails. Compare OCGA § 17-7-131(j).

4. At the competency trial, the state peremptorily challenged two black prospective jurors and accepted one. Assuming, as the defendant contends, that the circumstances establish prima facie a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the trial court's determination that the prosecutor successfully rebutted the prima facie case is entitled to "great deference" and is not clearly erroneous. *See, e.g., Foster v. State*, 258 Ga. 736(2), 374 S.E.2d 188 (1988).

5. The defendant was not entitled to review the prosecution's jury records. *Wansley v. State*, 256 Ga. 624(2), 352 S.E.2d 368 (1987).

6. During the voir dire phase of the trial, an assistant district attorney accepted an invitation to have lunch with the sheriff and several law officers in the library of the Douglas County jail. The assistant district attorney discovered after his arrival that the defendant also had been invited. The defendant was the only jail inmate dining with the group, but two or three others were present to serve the meal.

After lunch, the defense attorney discovered what had happened, and moved to disqualify the district attorney and the members of his office, and to bar further prosecution of the case. The court denied the motion.

Stripling contends the state's conduct violated his right to counsel in violation of the rule of *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In *Massiah*, the defendant's right to counsel was held to have been violated when, after he was indicted, incriminating statements were elicited from him in the absence of counsel. See *Ross v. State*, 254 Ga. 22, 26 (fn. 3), 326 S.E.2d 194 (1985).

Stripling concedes he was not interrogated at this luncheon, and that the case was not discussed. He argues that the state's conduct was "not designed to elicit incriminating words but rather incriminating action;" i.e., how he functioned in jail.

Stripling, however, was in custody during and for several months preceding the trial. During at least part of this time, he had been under a "suicide watch." The state had ample opportunity to observe the defendant and how he functioned in jail. The record does not show that, by eating with the defendant, the assistant district attorney gained knowledge about the defendant that was not otherwise readily available. Thus, we conclude there is not reversible merit to the consti-

tutional issue raised by the defendant. We must add, however, that it ought to be obvious that a prosecutor should not dine with a criminal defendant without the knowledge of his attorneys while the case is being prosecuted. What occurred is a dangerous practice, and one we disapprove.

7. Stripling sought a pre-trial in-camera review of his parole file and the parole files of his father and brother.

Records in the possession of the State Boards of Pardons and Paroles are confidential. OCGA § 42-9-53. However, we have recognized that, in limited circumstances, the nondisclosure provisions of OCGA § 42-9-53 must give way to the defendant's right of access to potentially mitigating evidence. *Pope v. State*, 256 Ga. 195, 212(22), 345 S.E.2d 831 (1986). Accord, *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Thus, we have held that, on request, a trial court should review the defendant's parole file in camera, and disclose potentially mitigating evidence to the defendant that he does not otherwise have ready access to. *Pope v. State*, supra; *Walker v. State*, 254 Ga. 149(4), 327 S.E.2d 475 (1985). We have not, however, held that the trial court must review in camera the parole files of persons other than the defendant. *Isaacs v. State*, 259 Ga. 717(12), 386 S.E.2d 316 (1989). As has been noted, an "in camera inspection can become a 'ponderous, time consuming task if utilized in every case merely on demand.' [cit.]" *LaFave & Israel*, Criminal Procedure, Vol. 2, § 19.5 at p. 546 (1984). We hold that at least in the absence of a reasonably specific request for relevant and competent information, the trial court may decline to conduct an in-camera inspection of parole files of persons other than the defendant.

The trial court reviewed Stripling's parole file and determined there was no potentially mitigating evidence in the file not already known to and available to the defendant. We have reviewed the file and find no error in the nondisclosure of the defendant's parole file. *Walker v. State*, supra.

The trial court did not review the parole files of the defendant's brother or father. Since the defendant's request for such a review contained no more than speculation that these files might contain material evidence in mitigation, the court's refusal to review these files was not erroneous.

8. There is no merit to the defendant's claim that electrocution is cruel and unusual punishment prohibited by the Federal and Georgia constitutions. *Isaacs v. State*, supra, 259 Ga. at 722(7), 386 S.E.2d 316 (1989).

9. (a) During the voir dire examination, the defense asked a panel of prospective jurors if any of them had a "fear of firearms." The trial judge interjected: "I don't fear the firearm, I fear the nut that's holding it." On objection by the defendant, the court conceded the remark was improper, apologized for making it, and told the prospective jurors not to let it influence them in any way.

We agree with the defendant that the remark was improper, but find that the court's response was sufficient to cure any potential harm resulting from the improper remark.

(b) Contrary to the defendant's contention, the trial court did not tell prospective jurors that the case had been "well investigated." The court simply noted the case had been "investigated" while explaining to the prospective jurors, before dismissing them for the weekend, that they had no investigative duties and should not discuss the case with anyone, nor read about the case in the newspapers. These instructions were not erroneous.

(c) Near the conclusion of the guilt phase of the trial, the trial court told the jury that the law did not allow jurors to question witnesses, pointing out that a "judge down in south Georgia" let jurors ask "a couple of questions of a witness" and the "Court of Appeals reversed him, and, you know, when you have to try a case a second time it's about like eating cold collards."

The defendant contends this was an impermissible reference to appellate review.

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the U.S. Supreme Court vacated a death sentence where the prosecutor had argued that if the jury's sentencing verdict was unfair it could be corrected by an appellate court. See also, e.g., *Prevatte v. State*, 233 Ga. 929(6), 214 S.E.2d 365 (1975). In these cases, the jury was misled about the nature of appellate review and the argument tended to lessen the jury's sense of responsibility for its verdict.

The remarks in this case did not "attach diminished consequence to [the jury's] verdict" nor encourage the jury "to take less than full responsibility" for its verdict. *Prevatte v. State*, supra at 931, 214 S.E.2d 365. See also *Kimbrough v. State*, 254 Ga. 504, 506(3), 330 S.E.2d 875 (1985); *Ingram v. State*, 253 Ga. 622, 637(17), 323 S.E.2d 801 (1984). There was no reversible error.

10. There is no requirement to sequester a competency-trial jury, even in a death penalty case. *Willis v. State*, 243 Ga. 185(5), 253 S.E.2d 70 (1979).

11. No victim-impact evidence was introduced in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

12. Stripling's 16th enumeration is controlled by *Putman v. State*, 251 Ga. 605, 614(12), 308 S.E.2d 145 (1983), wherein we held:

> [T]he doctrine of mutually supporting aggravating circumstances precludes imposition of two death sentences where the sole statutory aggravating circumstance is that the defendant has committed a double murder. [Cits.] Nonetheless, where, as here, each murder conviction is supported by an independent statutory aggravating cir-

> cumstance (in this case, armed robbery), the jury may impose the death penalty for each murder. [Cit.] In such cases, that the jury has designated each murder as a statutory aggravating circumstance supporting the death penalty for the other does not require the reversal of either death sentence. [Cit.]

13. Ground 38 of Stripling's motion for new trial alleged:

> That ... conversations between the defendant and his attorneys which occurred in the Douglas County Jail pretrial, during the trial, and post-trial, were electronically monitored by agents of the Douglas County Sheriff's Department, in violation of the defendant's rights under the 5th, 6th, 8th and 14th Amendments to the United States Constitution, the correllative provisions of the Constitution of the State of Georgia, and both State and Federal statutory and case law.

Hearings were conducted on these allegations. One of the witnesses was a reporter for the Fulton County Daily Report, who had written an article based on information from "confidential sources" allegedly reporting "precise details on a systematic policy of eavesdropping" of attorney-client communications at the Douglas County jail.

The reporter was called as a witness by the defendant. She declined to reveal the identity of her confidential sources (described in the article as "three former employees of the Douglas County Sheriff's Department"), relying on the recently enacted "shield law" creating for members of the news media a qualified privilege against the disclosure of information. The law, OCGA § 24-9-30, provides:

> Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or

prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant;

(2) Cannot be reasonably obtained by alternative means; and

(3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

The trial court allowed the reporter to invoke the privilege except as to information already publicly disclosed, in the article or elsewhere (and as to which the privilege was waived). The reporter was not required to reveal the identities of her informants.

(a) The defendant contends it was error to allow the reporter to invoke the privilege. We disagree. Assuming the information was "material and relevant," and "necessary to the proper preparation ... of the case ...," the defendant failed to show that the information could not have been "reasonably obtained by alternative means." OCGA § 24-9-30. The evidence shows that there were fewer than a dozen former employees of the sheriff's office in the relevant time period, and that the defense team made no effort to contact any of them. The trial court did not err by allowing the reporter to invoke the privilege. Compare, *Zerilli v. Smith*, 656 F.2d 705 (D.C.Cir.1981).

(b) The defendant contends the trial court erred by not granting his motion for new trial on the ground that his attorney-client communications were monitored by jail personnel. The evidence, however, which includes testimony by the sheriff and his staff, fails to establish a violation of the de-

fendant's attorney-client privilege. The court's denial of the defendant's motion for new trial was not erroneous.

14. Error, if any, in allowing a state's exhibit to be displayed to the jury with a label on it showing the chain of custody, was harmless.

15. The court's instructions defining mitigating circumstances were sufficient. *Davis v. State*, 255 Ga. 598, 612(22), 340 S.E.2d 869 (1986).

16. The evidence supports the jury's findings of statutory aggravating circumstances. OCGA § 17-10-35(c)(2).

17. We do not find that Stripling's death sentences were imposed under the influence of passion, prejudice or other arbitrary factor. OCGA § 17-10-35(c)(1). The death sentences are not excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of the death sentences in this case.

Judgment affirmed.

CLARKE, C.J., SMITH, P.J., and BELL, HUNT, BENHAM, and FLETCHER, JJ., and Judge G. MALLON FAIRCLOTH concur.

WELTNER, J., not participating.

APPENDIX

Lee v. State, 258 Ga. 762, 374 S.E.2d 199 (1988); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987); *Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987); *Romine v. State*, 256 Ga. 521, 350 S.E.2d 446 (1986); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986); *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984); *Finney v. State*, 253 Ga. 346, 320 S.E.2d 147 (1984); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Roberts v. State*, 252 Ga. 227, 314 S.E.2d 83

(1984); *Putman v. State*, 251 Ga. 605, 308 S.E.2d 145 (1983); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640 (1983); *Rivers v. State*, 250 Ga. 288, 298 S.E.2d 10 (1982); *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708 (1982); *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1981); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974).

SUPREME COURT OF THE UNITED STATES
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William K. Suter
Clerk of the Court
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February 11, 2004

Mr. Mitchell D. Raup
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, D.C. 20006

Re: Alphonso Stripling
v. Frederick Head, Warden
Application No. 03A692

Dear Mr. Raup:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on February 11, 2004 extended the time to and including April 5, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by: /s/ SANDY SPAGNOLO

Sandy Spagnolo
Case Analyst

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
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NOTIFICATION LIST

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